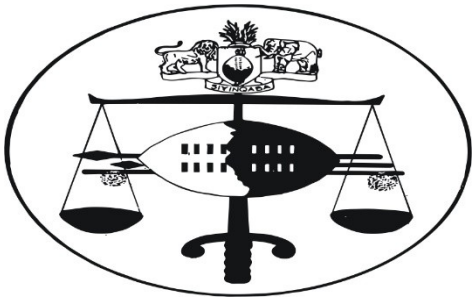


IN THE INDUSTRIAL COURT OF APPEAL OF ESWATINI

Case No. 4/2021

In the matter between

SIZA KNOWLEDGE DLAMINI Appellant

and

ESWATINI PARKING RECON TRANSPORTATION SOLUTION PTY LTD First Respondent

CONCILIATION, MEDIATION AND ARBITRATION COMMISSION (C.M.A.C) Second Respondent

NEUTRAL CITATION: ***Siza Knowledge Dlamini v Eswatini Parking Recon Transportation Solution Pty Ltd and Another [2021] (04/2021) SZICA --***
(27 October 2021)

CORAM: VAN DER WALT, NKONYANE AND MAZIBUKO JJA

HEARD : 5 August 2021, 19 August 2021

DELIVERED: 27 October 2021

Summary

Procedure - Right of appearance - Court may raise issue mero motu.

Procedure - Right of appearance in Industrial Court of Appeal - reference to "legal representative" in the Rules of the Industrial Court of Appeal is reference to duly admitted legal practitioners as meant by the Legal Practitioners Act, 1964 - only such practitioners are permitted to represent a party in the Industrial Court of Appeal

Procedure - Right of appearance in Industrial Court of Appeal - section 10 of the Industrial Relations Act, 2000 does not find application to the Industrial Court of Appeal but only to the Industrial Court

Procedure - Precedent – Stare decisis – Court not bound by previous judgments made per incuriam (i.e., failing to apply a relevant provision or ignoring a binding precedent) or made sub silentio (i.e., without notice being taken or without making a particular point of the matter in question)

The Legal Practitioners Act, 1964 - finds application in respect of the Industrial Court and the Industrial Court of Appeal.

JUDGMENT

Cur Adv Vult
(Postea 27th October 2021)

VAN DER WALT, JA

[1] This Judgment concerns the right of appearance in this Court by a person representing a party and more in particular, by whom a party may be represented in this Court.

A BACKGROUND

[2] When the matter was first called, on the 6th August 2021, the Appellant was not present in person and a Mr Sibusiso B Dlamini (hereinafter referred to as "Mr Dlamini" [1]) informed the Court that he was appearing on behalf of the employee Appellant as his ***"legal representative."*** Attorney Mr H Magagula represented the employer, the first respondent. There was no appearance for the second respondent ("**CMAC"**), who appears be to be abiding by the outcome of this appeal.

[3] The Court *mero motu* raised the issue of Mr Dlamini's right of appearance in this Court since Mr Dlamini is not a duly admitted legal practitioner as is meant by Legal Practitioners Act, 1964 (hereinafter referred to as **"legal**

[1] The appellant's surname also is Dlamini but the appellant will be referred to herein as the "Appellant"

practitioners" and the "**Legal Practitioners Act**" respectively.) Mr Dlamini is understood to belong to a category of persons currently appearing in the Industrial Court who are not legal practitioners and who do not inhabit the litigants' workplace. For ease of reference, this *genus* will be referred to herein as ***"external persons."***

[4] Mr Dlamini started to argue a certain position but the Court postponed the matter to the 19th August 2021 to afford Mr Dlamini the opportunity to engage the services of a legal practitioner, if he so wished, and for heads of argument[2] to be filed in order that the issue may be canvassed fully.

[5] When the hearing recommenced, Mr Dlamini informed the Court that he was going to proceed without the assistance of Counsel. The Appellant was present and the Court invited the Appellant to sit in the well of the court, next to Mr Dlamini, so that the Appellant may follow the proceedings closely.

B THE ISSUES

[6] The main issue for decision is the appropriate interpretation of various statutes as well as Rules of Court directly or indirectly pertaining to the representation of parties before this Court.

[7] In particular, but without affecting the generality of the aforegoing, the following dominate:

[2] Messrs Dlamini and Magagula both filed heads of argument

7.1 **Section 10** of the Industrial Relations Act of 2000 (hereinafter referred to as the **"2000 IRA"**) which reads:

> ***"Subject to any rules made under section 9, any party to any proceedings brought under this Act before the Court may represent itself[3] or be represented by a legal practitioner or any other person authorized by such party;"*** and

7.2 The following definitions as contained in **Rule 2** of the Rules of this Court:

> ***"Appellant" means the party appealing from a judgment and includes his legal representative"***
>
> ***"Counsel" includes an advocate and an attorney***
>
> ***"party" means any party to the appeal and includes his legal representative"***

[8] The question has also arisen whether **external persons** may appear as an "***authorized representative***" of a party in terms of the said **section 10** or as a ***"legal representative"*** in terms of **Rule 2** of the Rules of this Court.

C THE RESPECTIVE SUBMISSIONS

[9] It is of fundamental importance that justice should not only be done but should manifestly and undoubtedly be seen to be done. A right to a fair hearing is entrenched in **section 21(1)** of the Constitution, 2005. Where a lay litigant appears in person, therefore, the duty of the Court would be to guide and assist such litigant. This also entails that the Court will resort to an

[3] Presumably a reference to a right to appear in person

exercise of seeking to identify whatever merit may be contained in their submissions and to do justice to any such merit should same be found.

[10] In the case of Mr Dlamini, he is neither a litigant nor, in his own estimation, is he a lay person because he considers himself to be a capable ***"lawyer."*** The variety of hats tossed into the ring by Mr Dlamini *in casu*, occasioned the lengthy judgment herein, and the index attached to the end of the judgment may be of assistance to the reader hereof.

C.1 BY MR DLAMINI

[11] It needs to be stated from the outset that the Court experienced difficulty in following Mr Dlamini's reasoning and arguments, which were not always particularly well-articulated. Mr Dlamini also appeared to experience difficulty in understanding the Court's concerns and the questions by the Court arising therefrom.[4] The Court further was constrained to explain certain basic legal terms and principles such as who a party to litigation is.

[12] It will be endeavoured to condense, as accurately as possible, Mr Dlamini's submissions as captured in his heads of argument and embellished or added to in Court. The Court understood Mr Dlamini's contentions to amount to the following:[5]

[4] The Court enquired more than once whether Mr Dlamini required the services of an interpreter. These invitations were declined.
[5] Sequence Court's own

12.1 ***That the court was not entitled*** **mero motu** ***to raise the issue of Mr Dlamini's appearance before it***

12.1.1 When argument was already well underway, Mr Dlamini asserted that the issue is "***unlawfully***" before the Court because a respondent did not raise Mr Dlamini's ***"locus standi"*** by way of a formal application also citing the Law Society of Eswatini. Mr Dlamini continued:

> ***"The issue was only raised by the Judge which is unconscionable because the Judge cannot be a respondent and a judge at the same time. We expect impartiality before the Judge*** [illegible] ***the independence of the Judiciary."*** [6]

12.1.2 Because the Court is not a respondent, the submission continued, the Court in Mr Dlamini's words had no ***"jurisdiction"*** to ***"argue"*** the matter.

12.2 In terms of interpretation of statutes, if a provision "is capable of more than two interpretations," that one that does not take away existing rights should be preferred and Mr Dlamini had appeared in the Industrial Court of Appeal on previous occasions, without any challenge of a right to do so

12.2.1 Mr Dlamini submitted that the Rules of this Court are not clear and therefore should not be interpreted to exclude persons and thus deny them a right of appearance already enjoyed.

12.2.2 It was only when the Court enquired whether Mr Dlamini himself had appeared before this Court, that he informed the Court that he had done so and had the cases to prove it. Mr Dlamini furnished hard copies thereof after the hearing[7] being copies of ***Dumisani Doctor Tsela v Welile Mazibuko***

---

[6] *Verbatim*

[7] All persons were afforded the opportunity to file additional submissions thereon but none were received

[13/2017(2017)] SZlCA 04 (2017) and ***Dumsani Doctor Tsela v Welile Mazibuko (7/2019) [2019]* SZICA *(11) 16th October 2019*** respectively.

12.2.2.1 In the 2017 matter, Mr Dlamini was referred to by the Court as that appellant's "*Counsel*"[8] more than once and neither the other party nor the Court appeared to have given his appearance a second thought, nor does it appear that Mr Dlamini had corrected the Court. (The Court takes notice that Counsel back then did not robe when appearing in this Court, which may have occasioned confusion.)

12.2.2.2 In the 2019 matter, wherein the judgment was delivered by the Honourable Mr Justice Mlangeni[9], it is evident that the Court had become aware that Mr Dlamini was not Counsel. The first paragraph of the judgment reads:

> "***[1] This appeal could easily have been avoided if the Appellant had paid attention to the Rules of the Industrial Court in respect of the amendment of pleadings. And again, the potpourri, both in form and substance, that has been presented to this court in the name of an appeal could easily have been obviated if the Appellant had paid attention, even cursory attention, to the rules of this court in respect of the lodging of appeals. The record of appeal was prepared and filed by the Appellant's representative, one Sibusiso B. Dlamini, who describes himself as an adult Swazi male "……studying LLB (Hons) in Legal Practice in Manchester Metropolitan University – Law School, in United Kingdom".[10] Sadly, and unavoidably, this description of self gives a hint of the misplaced energy that has been invested in the hopeless pursuit of the case on behalf of the Appellant, both in the court-a-quo and in this court."***

12.2.3 Perusal of both judgments show that Mr Dlamini's appearance before this Court was not challenged or explored, no arguments were addressed in respect thereof and no finding was made thereon.

---

[8] I.e., the usual nomenclature for an attorney or advocate duly admitted under the **Legal Practitioner's Act, 1964**

[9] Who did not sit in the 2017 matter

[10] See his affidavit of Service dated 29th August 2019 [quotation from judgment]

12.3 That section 10 is of application to the Industrial Court of Appeal

12.3.1 Mr Dlamini submitted that he was authorized under this section to appear in the Industrial Court of Appeal.

12.3.2 Alerted by the Court to the fact that ***"Court"*** referred to in **section 10** is defined in **section 2** of the **2000 IRA** as ***"the Industrial Court established under section 6***" and that the same section provides that "***Industrial Court of Appeal***" means "***the Industrial Court of Appeal established under section 20,"*** Mr Dlamini's eventual submission was that the Industrial Court of Appeal should have been mentioned in the definition of "***Court"*** and therefore that there was a typographic error and further, the failure to mention any representative other than Counsel in the Rules of this Court, constitutes another glaring error.

12.3.3 Alternatively, because the Industrial Court of Appeal is not mentioned in the definition of ***"Court,***" the argument went, the Industrial Court of Appeal is not a Court at all.

12.4 That an external person may be authorized to appear by parties in terms of section 10

12.4.1 **Section 10** was the point of departure in Mr Dlamini's heads of argument and he vigorously maintained that persons of this ilk may so be authorized and may appear accordingly as ***"authorized persons"*** in the Industrial Court as well as in this Court, also because an ***"authorized person"*** would be a "***legal representative"*** as well for purposes of the Rules of this Court.

12.4.2 The Court enquired, if any person at all could be authorized by a party to represent the party in Court under **section 10**, whether that means that a party is at liberty to authorize for instance their grandmother or any random person. Mr Dlamini's response amounted to a proposition that any party can do so provided that the person to be authorized studied law or understands legal proceedings. This, in Mr Dlamini's opinion constitutes "***legal capacity"*** (hereinafter referred to as ***"Mr Dlamini legal capacity."****)*

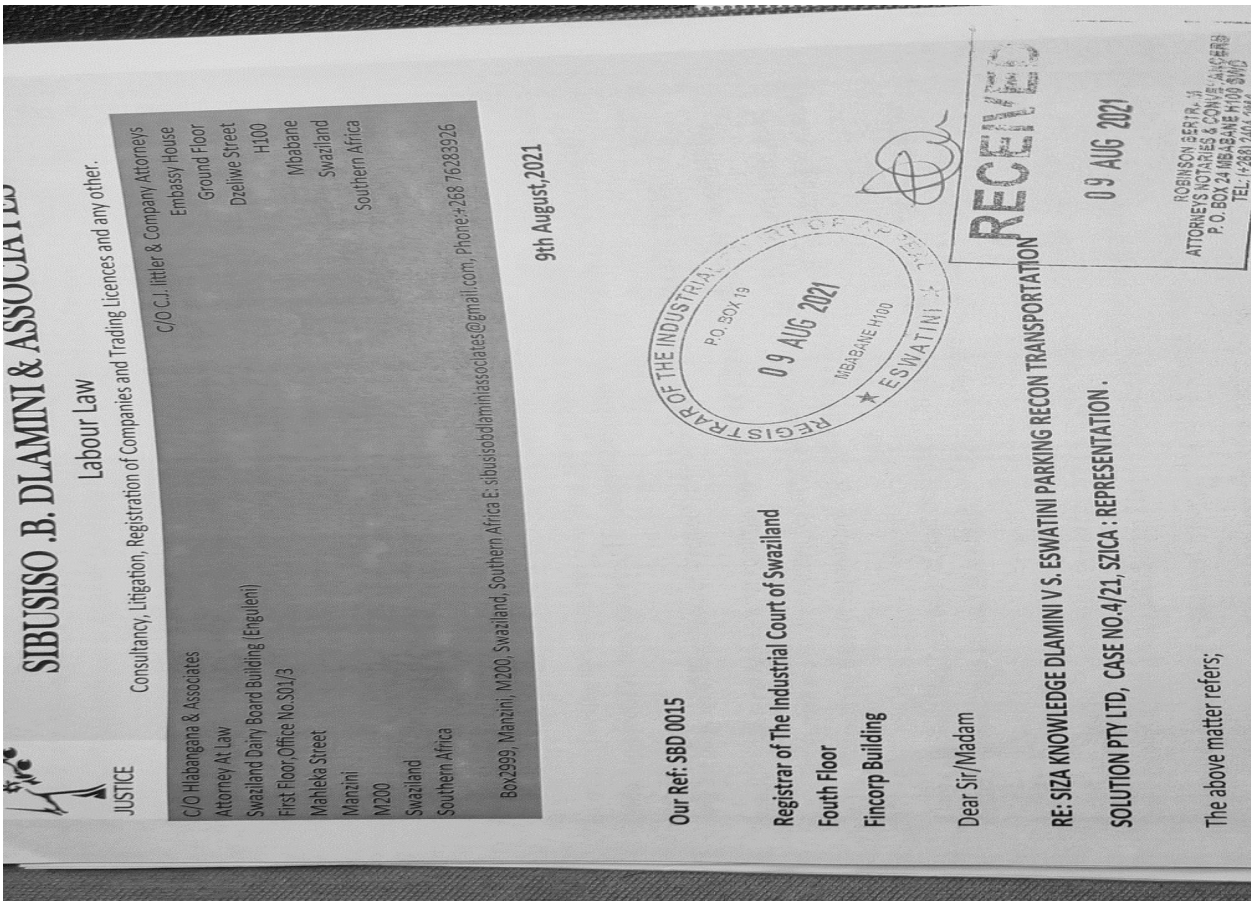
12.4.3 Mr Dlamini was unable to refer the Court to any recognised basis or provision in law to that effect but apparently felt driven to motivate why he felt that he is a person possessed with ***"Mr Dlamini legal capacity"*** who understands legal proceedings and thus is equipped to represent a litigant:

12.4.4 Amongst others, Mr Dlamini maintained, he may call himself a ***"lawyer"*** because he is or has been a law student; that he renders services for reward on a contingency basis, only taking a percentage of monies awarded to his client if his client wins. Further, that he has been operative in the labour courts for years and if he had been doing anything wrong, that he would have been arrested.

12.4.5Mr Dlamini saw nothing potentially perilous as regards his letterhead (header and footer of his letter to the Registrar of this Court reproduced below[11]) or that it may suggest that he is actually a legal practitioner because, he submitted, he is entitled to tell his clients that he is a "***lawyer"***

[11] The footer reading: ***"Diploma in Law Uniswa, LLB Uniswa, LLB Hons in Legal Practice (Student), Manchester Metropolitan University, United Kingdom"]***

and that he would advise his clients that he is not an attorney or advocate but that he can represent them in court [12] because he then would be their "***legal representative.***"



SIBUSISO .B. DLAMINI & ASSOCIATES

JUSTICE

Labour Law

Consultancy, Litigation, Registration of Companies and Trading Licences and any other.

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9th August,2021

Our Ref: SBD 0015

REGISTRAR OF THE INDUSTRIAL COURT P.O. BOX 19 09 AUG 2021 MBABANE H100 ESWATINI

Registrar of The Industrial Court of Swaziland
Fouth Floor
Fincorp Building

RECEIVED 09 AUG 2021

Dear Sir/Madam

RE: SIZA KNOWLEDGE DLAMINI V S. ESWATINI PARKING RECON TRANSPORTATION SOLUTION PTY LTD, CASE NO.4/21, SZICA : REPRESENTATION.

The above matter refers;

ROBINSON BERTRAM ATTORNEYS NOTARIES & CONVEYANCERS P. O. BOX 24 MBABANE H100 SWD TEL: (+268) 2404 [illegible]

[redacted]

[12] In Mr Dlamini's "A*ffidavit of Service*" of papers in this appeal, he described himself thus: ***"I am the Appellant's Legal Representative, practicing as such, under the style name SIBUSISO B DLAMINI, C/O C.J.littler & Company Attorneys, Embassy house, Ground Floor, Cnr. Mskato & Dzeliwe Street, Mbabane, Swaziland."***

12.4.6 It appeared that Mr Dlamini had nothing on point to add to these submissions.

12.5 That Mr Dlamini is the Appellant's legal representative in this Court

12.5.1 Rule **2** of the Rules of this Court defines "***party"*** as ***"any party to the appeal and includes his legal representative"*** and Mr Dlamini contended that he was a ***"legal representative"*** [13] because the Appellant had authorized him to appear on the Appellant's behalf.

12.5.2 **Section 10** does not contain the term *"**legal representative"*** but Mr Dlamini's oral argument carried a refrain to the effect that the term would include a person who was authorized as if authorized under **section 10.**

12.5.3 It perhaps is best to reproduce the relevant portion (of American origin) of Mr Dlamini's heads of argument and not to attempt to paraphrase same:

> *"5. I submit that Interpretation of **Legal Representative** are as follows; **Legal Representative** means Lawful Representative, Attorney or, Unadmitted Lawyer, or Non Attorney, **Lawful Representative** means any Authorized Person, **Authorized Person** means Lawfully Authorized Person to represent a person, or appear on behalf of person in Court or in any matter.*
>
> ***Bryan A. Garner, Editor in Chief, Black's Law Dictionary, Eighth Edition, 2004, Thomson West, page 1328.***
> *Lawful Representative means 1. A Legal heir 2. An Executor, Administrator, or other Legal Representative.*
> *Legal Personal Representative means, 1. When used by a testator referring to personal properties, an executor or administrator. 2 When used by a testator referring to real property, one to whom the real estate passes immediately, upon the testator death. 3. When used concerning the death of a mariner at sea, the public administrator, executor, or appointed administrator in the seaman's state of residence*
>
> **(Online).Available at: https://www.lawinsider.com/dictionary/legal-representative?Cursor=Cl8SWWoVc35sYXdpbnNpZGVyY29udHJhY3RzckALeh**

[13] See also again Footnote 11 *supra* wherein Mr Dlamini described himself in an affidavit as being "***… the Appellant's Legal Representative, practicing as such…"***

1EZWZpbmlOaW9uU25pcHBldEdyb3VwX3YyM19lbildbGVnYWwtcmVwcmVz ZW50YXRpdmUjMDAwMDAw MTQMGAAgAA%3D%3D (Accessed: 5th August, 2021).”

12.5.4 Mr Dlamini appeared to accept, eventually, that in the law of Eswatini, a minor, insolvent, mentally affected or deceased person cannot themselves be a party to proceedings because they lack legal capacity to do so; only their guardian, trustee, liquidator, curator or executor can be a party and then as a ***representative litigant***, and not as a ***legal representative*** in the sense of a person providing legal representation to a party cited in the proceedings in Court. However, Mr Dlamini insisted that the Appellant lacks ***“Mr Dlamini legal capacity”*** and thus Mr Dlamini may appear on his behalf.

12.5.5 Mr Dlamini was advised by the Court, in the context of litigation, that Courts understand a ***“legal representative***” to refer to Counsel. Mr Dlamini was also referred to the **Magistrates Court Act, 1938** which in **section 7** thereof in passing alludes to ***“legal representative”*** and **Order IV, Rule 1(1)** which reads that: ***A party may appear and conduct his case either — (a) in person; (b) by an attorney; or (c) by an advocate duly instructed by an attorney.”***

12.5.6 Mr Dlamini’s undeterred response thereto was he too may appear in the Magistrate’s Court, if authorized by a client because once authorized, he would become a “***legal representative.”*** Again, Mr Dlamini could not provide any legal authority in support of his argument.

12.5.7 The Court also referred Mr Dlamini to ***Grogan’s*** **WORKPLACE LAW**[14] wherein a clear distinction is drawn between a representation by a lay person on the one hand, and legal representation i.e., representation by legal

[14] 10th Edition at p 240

practitioners, on the other. However, this did not appear to assist or persuade Mr Dlamini, who resolutely stuck to his guns.

12.6 That Mr Dlamini himself became a party to the proceedings by virtue of authority conferred by the Appellant

12.6.1 Mr Dlamini was unable to refer the Court to any authority to the effect that a person who represents a cited party, i.e., Counsel or another representative, becomes a party to the proceedings as well by virtue of such representation.

12.6.2 By then the Appellant was looking somewhat nonplussed and the Court attempted to explain the position by way of the following illustration: Should the Appellant sue a party for the purchase price of a vehicle sold by him to that party, the seller and the purchaser are the only parties to the Court case; the attorney or other representative has no substantial legal interest in the matter because they are there only to facilitate the party's case and do not themselves become a party to the case; they are neither seeking nor opposing relief for themselves. The Court also explained joinder. The Appellant indicated that he understood. Mr Dlamini, on the other hand, continued to maintain that he (Mr Dlamini) had morphed into a party to the proceedings.

12.6.3 It also appeared that Mr Dlamini had difficulty accepting the view that references in the Rules to a party including reference to its legal representative, is only for purposes of filing papers and so forth and does not transform such representative, who is neither seeking nor opposing relief for himself or herself, into a litigant cited in legal proceedings.

12.7 That the Legal Practitioners Act is not applicable to the Industrial Court of Appeal

12.7.1 The exact wording in Mr Dlamini's heads of argument included:

> ***"9. Further, Appellant humble* [sic] *submits that the Legal Practitioners Act, 1964, Date of Commencement: 14th January, 1966, is not applicable to the Industrial Court of Appeal of Swaziland. It may only partly apply to Council,* [sic] *or advocate and an attorney, or articles of clerkship, but not to Legal Representative, or Authorized Person."***

12.7.2 This was followed by a quotation of **section 2** of the Legal Practitioners Act which defines ***"Courts"*** as:

> ***"… the Swaziland Court of Appeal, the High Court of Swaziland, the Swaziland Water Court, the Judicial Commissioner's Court, the Magistrates' Courts established under the Subordinate Courts Proclamation, Coroner's inquests held in terms of the Inquests Act, No. 59/1954, liquor licensing boards constituted under a law relating to liquor licensing and all other tribunals in which practitioners have the right of audience but, subject to the provisions of any other law, does not include any Swazi Court or Swazi Court of Appeal established under any law relating to such Courts."***

12.7.3 Mr Dlamini's contention appeared to be that that this Act does not apply to this Court because this Court was not in existence when that Act was promulgated. The Court led Mr Dlamini step by step through an analysis of the legislation and bodies referred to in the section, as well as the evolution of labour law *fora* since 1963. Mr Dlamini was prepared to recognise, only, that Counsel has right of appearance in this Court.

12.7.4 The Act, Mr Dlamini persisted, does not apply to this Court and hence does not apply to "***legal representative"*** or "***authorized person.***"

12.7.5 The Court interprets this submission to imply that neither an "***authorized person"*** as meant in **section 10** nor a ***"legal representative"*** who is not Counsel, can fall foul of this Act and hence, that any strictures imposed by or consequences attached to certain conduct by this Act, do not apply to goings-on in the labour Courts involving persons who are not legal practitioners.

12.8 That section 11 of the 2000 IRA permits for the right of appearance claimed

12.8.1 This section reads:

> ***"11. (1) The Court shall not be strictly bound by the rules of evidence or procedure which apply in civil proceedings and may disregard any technical irregularity which does not or is not likely to result in a miscarriage of justice.***
> ***(2) Without restricting the generality of subsection (1), the Court may admit as prima facie evidence a report filed under this Act, or a written report prepared by the office of the Commissioner of Labour or the Commission."***

12.8.2 Mr Dlamini submitted that:

> "***… should the Court issue a judgment that any other authorized person cannot appear in this Court that will result in a miscarriage of justice and even abuse of court process or even attempting to defeat, obstruct the administration of justice, that is in terms of criminal law, my Lord."***[15]

C.2 BY MR MAGAGULA ON BEHALF OF THE FIRST RESPONDENT

[13] Mr Magagula commenced by submitting that the Court was fully entitled to raise the issue of appearance *mero motu* and that no application on behalf of the respondent was required, then proceeded submit, crisply and concisely, as follows.

---

[15] *Verbatim*

13.1 That the Industrial Court of Appeal was established in the following express terms in **section 20(1)** of the **2000 IRA**: *"There is established an Industrial Court of Appeal which shall have the same powers and functions as the Court of Appeal*[16] *but shall only deal with appeals from the Industrial Court."* It is trite that only admitted attorneys and advocates may appear in the Supreme Court hence the same decorum and protocol applies in both these courts, from which it follows that only Counsel may represent a party.

13.2 That **Rule 2** of the Industrial Court Rules defines "***party"*** as "***any party to Court proceedings and includes a person representing a party"*** whereas **Rule 2** of the Rules of the Industrial Court of Appeal define ***"party"*** as "***any party to the appeal*** **and includes his *legal representative."*** This, it was submitted, is a significant difference in that the Industrial Court Rules do not at all refer to a "***legal representative,***" but only to a person representing a party.

13.2.1 According to the author Lourens M du Plessis: [17]

> ***"In construing the words of a statute, it must be assumed that the legislature used them in their popular sense, unless they have acquired a different technical meaning in legal nomenclature or unless the context or subject matter clearly shows that they were intended to be used in a different sense."***

13.2.2 As for Mr Dlamini's argument that a legal representative becomes a party, a person cannot be a both a party and a representative at the same time.

13.3 As regards the encroachment-on-existing-rights argument advanced by Mr Dlamini, that there is no question of ambiguity or taking away of rights and in any event, that Mr Dlamini, in law, had never enjoyed a right

[16] i.e., the Supreme Court
[17] **THE INTERPRETATION OF STATUTES** at p.104

of appearance:

> *"This is an incorrect proposition if one clearly appreciates the context. In deciphering the ordinary meaning and context, the learned author* ***Lourens*** *further states thus:*
>
> ***"1. "Context" does not merely denote the language of the rest of the statute but includes its matter, its apparent purpose and scope and, within limits, its background.***
> ***2. The recognition of the relevance of context allows for two possible avenues of approach:***
> ***(i) the first approach initially concentrates on the "clear, ordinary meaning" of the language and appeals to the context only in instances where the language appears to admit of more than one meaning, whereas***
> ***(ii) the second approach entails that the context and the language are to be interpreted together right from the outset.***
> ***3. The result arrived at should in both instances always be the same, since "the object to be attained is unquestionably the ascertainment of the meaning of the language in its context" and "(the difference in approach is probably mainly a difference in approach is probably mainly a difference on emphasis."*** [18]

13.4 The fact that only the word "*Counsel"* keeps on reappearing through the Rules of this Court, contextually indicates that representation is restricted to Counsel.

13.5 Because this Court is a specialist Court confining itself to questions of law, the Legislators anticipated at back of their minds that the only ***"legal representatives"*** with right of appearance would be legal practitioners, being persons specifically equipped to postulate and argue the law.

D LEGAL PRINCIPLES AND ANALYSIS

[18] Extract from Paragraphs 12 and 13 of heads of argument

[14] Ordinarily, Counsel is well versed in Court etiquette and well prepared to address the legal issues before Court in a thoughtful and reasoned manner. As such, Counsel is well primed and equipped to assist the Court, in a decorous fashion, to come to an appropriate decision. Mr Dlamini's ***"Mr Dlamini legal capacity,"*** in comparison, unfortunately fell dismally short.

14.1 Mr Dlamini was unable to refer to case authorities in support of his submissions but freely bandied about terminology such as "***illogical, unreasonable and unjust"*** or ***"the law is clear"*** or "***let me interpret***" or ***"let us talk about what the law is and not what it ought to be,"*** as if Mr Dlamini himself is an authoritative fount of legal knowledge.

14.2 Mr Dlamini was unable to tell the Court what may be appealed against to this Court (i.e., questions of law only) or what the requirements for a notice of appeal are; the word "*astonishing"* comes to mind in this respect because Mr Dlamini was purporting to represent a party on appeal to this Court.

14.3 When the Court referred Mr Dlamini to the 1980 Industrial Relations Act, he clearly was unaware of its existence and told the Court in no uncertain terms that that the Court was wrong because the 1980 Act is the Employment Act. When asked about the Legal Practitioners Act and apparently finding himself stuck, he told the Court that the Act is going to be amended.

14.4 Other examples would include that Mr Dlamini did not know what the definition of "***Court"*** in **section 2** of the 2000 Act was and when his attention was directed to it, he trimmed his sails to the wind to submit that reference to this Court had been omitted therein. Mr Dlamini also relied on

the definition of ***"Courts"*** in the Legal Practitioners Act but never researched the statutes or bodies referred to therein to ascertain what lay behind the meaning of the definition; Mr Dlamini seemed surprised to learn that there are forms to the Court Rules and Mr Magagula kindly assisted Mr Dlamini to locate same; and Mr Dlamini was unaware of the well-known and oft cited case of ***Sazikazi Mabuza v Standard Bank Swaziland*** dealing with legal representation in the workplace.

14.5 When the Court referred to a related passage in ***Grogan***'s work[19] and Mr Dlamini was handed a hard copy of the book, open at the relevant page, Mr Dlamini seemed to be at a loss and Magagula again kindly assisted. Thereafter, Mr Dlamini was reluctant to hand the book back straight away because he thought there might be things of interest to him therein. Quite unforgettable also was Mr Dlamini's assertion that as a matter of fact, there was a typing error in the definition of ***"Court"*** because the definition did not correspond with his opinion.

[15] The following extracts from the 2019 judgment referred to above, resonates with the Court:

> ***"[9] The index to the record of appeal shows that the notice of appeal is at pages 26 to 73 of the record – an incredible bulk of 47 pages. Well, in fairness to the Appellant the notice stricto sensu, at any rate according to his representative, is pages 26 to 47. I say this because pages 48 to 55 is the judgment appealed against, pages 56 to 64 is heads of argument for the Applicant in the court-a-quo, pages 65 to 69 is demand for security for costs in terms of Rule 47 of the High Court rules, pages 70 to 73 is a writ of execution in respect of legal costs and 74 – 75 is an affidavit of service in which, as noted earlier on in this judgment[20], the deponent gratuitously informs that he is studying for an honours LLB degree in the United Kingdom."***

[19] **WORKPLACE LAW** at p.240
[20] Paragraph 1

> ***"[10] I have taken the trouble in paragraph 9 above to make the breakdown in order to demonstrate that there is a lot that is wrong in the manner that the Applicant/Appellant's case is being prosecuted, and in particular to show that the Appellant's representative does not have a sufficient understanding of what a notice of appeal entails."***
>
> ***"[14] As I read the Appellant's papers, I became exhausted and depressed. A representative, in whatever capacity, must not take on a responsibility that is beyond his or her capacity. In casu there is no doubt that the Appellant's representative is in the deep end. At the hearing he was asked whether the rules of the Industrial Court of Appeal do provide for urgent appeals and he gave a verbose and circuitous answer on how appeals in this court can take anything between five to ten years to be heard, and how his client would be prejudiced by the delay, and that these are the reasons why he filed an urgent appeal. In the end he did not answer the simple question that was asked by the court. And the truth is that appeals that are prosecuted with seriousness do not take anything close to the period that was suggested by the Appellant's representative."***

15.1 In the appeal now before this Court, the record comprises **427** pages of which only some **85** pages (application, notice to raise points of law, judgment and notice of appeal) would constitute a proper record.

15.2 The instructive comments by the Honourable Mr Justice Mlangeni, patently, have fallen on deaf or recalcitrant ears.

[16] A grave measure of disquiet further was occasioned by Mr Dlamini's apparent inability or unwillingness to comprehend or to recognise that this Court is possessed of a dignity and an authority which, amongst others, does not permit for disrespectful or condescending behaviour, or for unfettered imputations or allegations of judicial impropriety.

16.1 Mr Dlamini made a *quantum* leap submission to the effect that the Court demonstrated bias, based merely on the fact that the Court had raised an obvious procedural issue. The "*indictment*" did not stop there since the Court's pursuit of legal clarity, was described by Mr Dlamini as arguing.

16.2 When Mr Dlamini felt disinclined to answer a question, he would tell the Court to ***"justify a section"*** or that ***"we have diverted from the issue***" or "***can we please move on***" or to "***focus on the matter before the Court."***

16.3 It transpired that Mr Dlamini's copy of the 2000 Industrial Relations Act did not contain the 2005 amendments because, when the Court referred to a section in its amended form, Mr Dlamini promptly suggested that the Court was referring to something that does not exist.

16.4 When a specific question was addressed to Mr Dlamini for an answer concerning the definition of ***"Court"*** Mr Dlamini told the Court that the Court's question is not the question.

16.5 When the Court was formulating a directive for copies to be provided of the cases Mr Dlamini stated he had appeared in, Mr Dlamini made an off-hand comment to the effect that the cases could be found on the internet, as if the Court could or should have looked for and found such cases itself.

16.6 In addition to the aforegoing, Mr Dlamini frequently would not let the Court speak, or interrupted the Court, or spoke over the Court, or simply ignored the Court, despite repeated requests not to do so, which resulted directly in adjournments. To abruptly halt the proceedings, appeared to be the best way to restore some order and decorum in Court and to get the attention of Mr Dlamini, who seemed to be carried away by an excess of zeal and to be marching to the beat of his own drum.

[17] Had Mr Dlamini not held himself out as person who knows and understands the law and court proceedings, the Court may have been more forgiving of his conduct. However, before Court is a lay appellant whose best interests are at stake and the Court in good conscience could not let the matter rest there, more so since the Honourable Mr Justice Mlangeni in the 2019 case further lamented as follows:

> ***"[16] There is no doubt that this fiasco is attributable to the Applicant's representative. But then the history of this matter abounds with such fiascos, such that the Appellant must, to an extent, take the blame for placing his trust on a representative who's only known credential is that he is studying for an LLB (Hons) in Manchester, England."***

The Court will now deal *seriatim* with Mr Dlamini's contentions:

D.1 AD POINTS RAISED *MERO MOTU* BY A COURT

[18] *Locus standi* concerns the right of a person to institute or oppose/defend legal proceedings. The right of appearance or audience before a Court is not a matter of *locus standi* if the "*appearer*" is not a party.

[19] As for the entitlement, if not outright the duty of the Court to query the issue of right of appearance *mero motu*, the following exposition finds application:

> ***"There can be no doubt that a court which is endowed with a particular jurisdiction has powers which are necessary to enable it to act effectively within such jurisdiction. I would regard them as powers which are inherent in its jurisdiction. A court must enjoy such powers in order to enforce its rules of practice and to suppress any abuse of its process and to defeat any attempted thwarting of its process."*** [21]

[21] **Connelly v Director of Public Prosecutions [1964] 2 All ER 401 (HL)** at 409E, cited for instance in **Chunguete v Minister of Home Affairs And Others 1990 (2) SA 836 (W)** at 840

[20] The then Chief Justice of the then South African Court of Appeal, Centlivres CJ in **Yates Investments (Pty) Ltd v Commissioner for Inland Revenue**[22] not only ***mero motu*** raised a point of right of appearance, but raised same in writing in a letter to the relevant attorneys, even prior to the commencement at the hearing.

[21] The case of **S v Sewnandan** [23] is on all fours with the instant matter:

> ***"At the commencement of the proceedings the Court raised the question whether Mr Singh has the right to appear on behalf of the appellant in this Court as he is not a practitioner whose name has been placed upon the roll of attorneys by the Registrar of this Court as provided for in s 4(3) of Act 62 of 1995 read with s 21 of the Attorneys Act 53 of 1979 (the Act) - it being common cause that he is admitted and enrolled as an attorney of the Natal Provincial Division. As this point came as a surprise to the legal representatives, the matter was remanded so as to enable them to submit written heads of argument, which they have done and for which the Court expresses its gratitude. The crisp question that now falls to be decided is whether Mr Singh has the right to appear in this Court."***

[22] The law therefore is unambiguous; the Court may, and in fact should, raise the issue of a right of appearance ***mero motu.*** There is no need to involve the Law Society and even less justification for abuse to be hurled at the Court.

D.2 AD PRECEDENT

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[22] **1956 (1) SA 364 (A)**

[23] **1999 (2) SA 1087 (O) at 1088 and further**

[23] As regards right of appearance, the question *simpliciter* is whether Mr Dlamini should be permitted to appear before this Court because he had previously done so without being challenged.

[24] Ordinarily a court is bound by precedent (***stare decisis***) but not in the case of ***per incuriam*** i.e., where the Court failed to apply a relevant provision or ignored a binding precedent; or in the case of a judgment made ***sub silentio*** i.e., without notice being taken or without making a particular point of the matter in question.

24.1 In Sealandair **Shipping and Forwarding v Slash Clothing Co (Pty) Ltd**[24] **1987 (2) SA 635 (W)** the following statement by "***Cross on Precedent in English Law"*** was cited with approval:

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

24.2 In **Ex Parte Transvaal Carbolic Acid Gas Works Ltd** [25] it was held to the effect that, where a correct procedure had not been insisted upon in the past, the Court had acted *per incuriam.*

24.3 The only local case authority where right of appearance has been challenged and decided in either the Industrial Court or in this Court, appears to be the matter of ***Dunseith and Another v President of the Industrial Court,***[26]

[24] **1987 (2) SA 635 (W)** at 259
[25] **1949 (4) SA 1010 (W)** at 1012
[26] **[1994] SZHC 2 (04 February 1994)**

where a declaratory order was sought. The case concerned right of appearance by an articled clerk, which was decided in favour of such appearance but which was decided with reference to the Legal Practitioners Act itself.

[25] In view of the principles of *sub silentio* and *per incuriam,* therefore, no binding precedent was established by previous appearances in this Court or in the Industrial Court, by any external person/s.

D.3 SECTION 10 OF THE INDUSTRIAL RELATIONS ACT, 2000 *vis-à-vis* THE INDUSTRIAL COURT OF APPEAL

[26] The topic of representation cannot be considered without having due regard to the historical and contextual perspective and evolution of the relevant statutes and Rules of Court.

26.1 *Ante* 1980 there was no creature of statute styled a "*Court*" in respect of labour matters. **The Industrial Conciliation and Settlement Proclamation, No 12 of 1963** (the "**1963 Proclamation"**) made provision for a Conciliation Board, an Arbitration Tribunal and a Board of Enquiry.

26.2 In 1980, the first **Industrial Court was** established by the Industrial Relations Act, No 4 of 1980 (the "**1980 IRA"**) which was published in the same Government Gazette Extraordinary [27] as the Employment Act, No 5 of 1980 (the "**Employment Act**") and which repealed the **1963 Proclamation.**

[27] No 55 of 10th October 1980

26.3 The **1980 IRA** was repealed by the Industrial Relations Act, 1996 (the "**1996 IRA"**) which in turn was repealed by the current **2000 IRA.**

26.4 The first **Industrial Court of Appeal** was established under the **1996 IRA** and the "***Conciliation, Mediation and Arbitration Commission*** ("**CMAC"**) under the **2000 IRA.**

[27] For purposes of determining the interpretational questions in the instant matter, the following remarks made in **Natal Joint Municipal Pension Fund v Endumeni Municipality,** [28] which encapsulate the canons referred to in argument, are apposite:

> ***"…Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or business like for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The inevitable point of departure is the language of the provision itself, read in context and having regard to the purpose of the provision and the background to the preparation and production of the document."***

[28] For ease of reference, the wording of **section 10** will be repeated:

> ***"Subject to any rules made under section 9, any party to any proceedings brought under this Act before the Court may represent itself or be represented by a legal practitioner or any other person authorized by such party;"***

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[28] **2012 (4) SA 593 (SCA) ([2012] 2 All SA 262; [2012] ZASCA 13) at [20] (abbreviation Court's own)**

28.1 The **1996 IRA** contained a provision similar to said **section 10** and the Industrial Court of Appeal was included in the definition of ***"Court"*** in that Act, but it was not so included in the subsequent **2000 IRA;** the Industrial Court of Appeal possesses its own, separate definition in **section 2** of the **2000 IRA.**

28.2 The different language employed in the **2000 IRA** is plain and simple: the "***Court***" referred to in **section 10** is stated, expressly, in **section 2** to be the **INDUSTRIAL COURT** established in terms of **section 6;** section **6** in turn indeed does establish the **INDUSTRIAL COURT**; and the **section 9** referred to in **section 10** is the section that governs the making of **INDUSTRIAL COURT RULES.**

28.3 **Sections 2, 20** and **22** contain separate provisions pertaining to the different (substantive) definition, establishment, powers and Rules of the **INDUSTRIAL COURT OF APPEAL**; as regards labour matters, the Industrial Court has the same powers as the High Court[29] but as per **section 20(1)**, a new section first appearing in the **2000 IRA**, the Industrial Court of the Appeal has the same powers as the Supreme Court.

28.4 Both Courts are defined in **section 2**; neither was left out.

[29] **Section 10** therefore is unequivocal and deliberately formulated: the section itself restricts its application to the **INDUSTRIAL COURT** only and thus reflects an unambiguous intention on the part of the part of the Legislature.

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[29] **§ 8(3)**

The language is clear and presumptions or other aids of interpretation need not be resorted to.

[30] Mr Dlamini's contention that this Court is not a Court because it is not mentioned in the definition of ***"Court"*** in **section 2**, by virtue of the aforegoing and the sheer absence of rationality in such a notion, is rejected as well.

[31] In the premises, it is held that **section 10** does not apply to this Court.

[32] Logically, the next enquiry simply would be whether appearance by Mr Dlamini in this Court is permitted by the Rules of this Court i.e., whether external persons qualify as "***legal representatives***."

[33] However, Mr Dlamini also contended, amongst others, that a person who may be authorized in terms of **section 10**, becomes a "***legal representative***" for purposes of appearance in this Court.

33.1 Having held that **section 10** does not apply to this Court, the Court is not convinced that the issue of right of appearance in the Industrial Court and the meaning of "***authorized person"*** in **section 10** should be adjudicated as if there were an appeal in respect of a determination thereon by the Industrial Court.

33.2 What is to follow in respect of ***"authorized person"*** in that context later hereunder, therefore is *obiter* only.

D.4 APPLICABILITY OF THE LEGAL PRACTITIONERS ACT, 1964

[34] The references to ***"Courts***" in this Act is in respect of right of appearance of advocates and attorneys, who may not appear in these courts unless duly admitted, with the exception of Swazi Courts, which prohibits appearance by legal practitioners in **section 23** of the **Swazi Courts Act, 1950.**

[35] The **1963 Proclamation,** which had preceded the **1980 IRA,** had created a specialist Arbitration Tribunal, the precursor to the Industrial Court, whereat ***"A person having an interest may, by attorney or advocate, be represented in any proceedings or enquiry held under this Proclamation."***[30] This enactment already was on the statute books by the time that the Legal Practitioners Act was promulgated. As such, it fell in the category of "... ***all other tribunals in which practitioners have the right of audience."***

[36] Mr Dlamini was at pains to exclude this enactment from this equation by maintaining that it does not apply to the Industrial Court or to this Court because same are not mentioned therein, not having been in existence at the time.

36.1 This Act is a 1964 Act which had become operative decades before the Industrial Court and the Industrial Court of Appeal were created. Attorneys and advocates had to be duly admitted in order to practise in the ***"Courts"*** and the definition of "***Courts***" sought to list which courts or other bodies or tribunals were recognised for that purpose. The only exclusion was (and remains) Swazi courts. At the time, the precursor of the Industrial Court was

[30] **§ 27(3)**

an Arbitration Tribunal at which legal practitioners enjoyed right of appearance.

36.2 To hold that the Legislature intended to restrict the operation of the Act only to certain courts or bodies in existence in 1964, for the remainder of days as contended by Mr Dlamini, cannot be sustained:

36.2.1 The legislative intention underlying the Legal Practitioners Act cannot be suggested to mean that the definition of ***"Courts"*** could not be supplemented or augmented by way of subsequent legislation (be it Acts of Parliament or subordinate legislation such as Court Rules) or that this Act would not apply to successors of the courts and other bodies in existence in 1964.

36.2.2 The logical extension of Mr Dlamini's proposition would be that an Act that is older than half a century, has the effect that only duly admitted attorneys and advocates may appear in the Magistrates Court because it already was in existence in 1964, but any casual person whatsoever may wander along and appear in courts or bodies not in existence in 1964, such as in the Supreme and High Courts of Judicature established under the 2005 Constitution. This would postulate a preposterous position.

[37] The Act therefore finds application to the Industrial Court and the Industrial Court of Appeal as well; to hold otherwise and to bow to an overly literal interpretation, would lead to insensible and unbusinesslike, if not outright absurd results.

[38] Other pertinent provisions of the Legal Practitioners Act would include:

38.1 **Section 26** provides that: "***No person, other than a legal practitioner, shall practise as such within Swaziland or in any manner hold himself out as or pretend to be, or make use of any words or any name, title or addition or description implying or tending to the belief that he is an advocate, attorney, notary or conveyancer or is recognized by law as such."*** A person who contravenes this provision shall be guilty of an offence and liable, on conviction, to a fine.[31]

38.2 Practising attorneys, notaries and conveyancers shall operate a trust account in respect of moneys held or received in respect of his practice or on account of any person, and keep proper books of account. Once a year, the trust account has to be audited and an appropriate certificate be furnished to the Attorney-General. Punitive sanctions are attached to non-compliance.[32]

38.3 Practitioners must also contribute to the Law Society Fund, to be used to compensate any person for loss sustained in consequence of theft, fraud, forgery or other dishonesty committed by a legal practitioner or his employee in relation to his practice or money or property entrusted to him. [33]

38.4 In the 1992 Bye-Laws, provision is made for a "*Fees Committee*" to assess, at the request of any person or member, the fees payable by such person to a practitioner.

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[31] **§ 26(8)**
[32] Various provisions under **§24**
[33] **§§ 43** and **44**

[39] Of the so-called *"presumptions"* i.e., the aids that have a purely auxiliary function and which may only be invoked in the process of interpretation if the language in question is not clear, the presumption that the Legislature intended to advance the public good is of prime relevance *in casu:*

39.1 The primary object of Acts such as the Legal Practitioners Act is to protect the public and promote administration of justice, the rule of law and legal certainty but also to protect the integrity of the profession and to ensure that the public is protected against unqualified or unscrupulous individuals entering, or this Court would add, trespassing on the profession.

39.2 By prohibiting legal practitioners from acting unless in possession of a valid fidelity fund certificate, for instance, the Legislature seeks to ensure that an attorney is not simply let loose on an unsuspecting member of the public. [34]

39.3 Similar considerations i.e., an enactment for the protection of the public, has been expounded in relation to an Act pertaining to estate agents" [35]

> ***" The general object of the Act was to protect the public against some persons by requiring all estate agents, as defined, to take out a fidelity fund guarantee (which is not granted automatically); and to pay the levies and contributions; and by requiring all estate agents to keep necessary accounting records and to cause them to be audited by an auditor; and by obliging every estate agent to open and keep a separate trust account with a bank and forthwith to deposit therein the moneys held or received by him on account of any person.***
>
> ***What the Act does is to clip the wings of those who for gain hold themselves out as sellers of immovable property, etc, or advertise that they are such persons. They must apply for fidelity fund certificates and comply with the requirements of the Act, including trust funds and audits. The Act does not express an intention to apply to the case of a member of the public who has neither held himself out nor advertised as aforesaid and who accepts a mandate offered by a friend to find a buyer, etc, on a commission basis. One does not impair the freedom of the individual unless compelled by law to do so. If it is contended that the Act***

[34] See **NW Civil Contractors CC v Anton Ramaano Inc and Another 2020 (3) SA 241 (SCA)** at [14] and [20]; **Ex Parte Mahon 2010 (2) SA 511 (GNP)** at [24]

[35] Estate Agents s Act 112 of 1976

contains a clear implication to curb such freedom, I would say that an implication cannot be clear if it has to be astutely winkled from contextual crevices.''[36]

[40] Sight of course should not be lost of the fundamental right enshrined in **section 32(1)** of the **Constitution, 2005** that "***A person has the right to practise a profession and to carry on any lawful occupation, trade or business,"***[37] but subject to "***respect for the rights and freedoms of others and for the public interest,"*** [38] which requires that an appropriate balance be struck. Constitutional rights are not unlimited and have not deprived the community of the right to demand that standards be set for professions, not only relating to competence but also with regard to unimpeachable integrity.[39]

D.5 "*LEGAL REPRESENTATIVE"*

[41] As set out previously, in terms of **Rule 2** of the Rules of this Court ***"Appellant means the party appealing from a judgment and includes his legal representative;" "Counsel" includes and advocate and an attorney; "party" means any party to the appeal and includes his legal representative."***

D.5.1 OVERVIEW

[36] **Rogut v Rogut** 1982 (3) SA 928 (A) at 939C, own underlining
[37] **§ 32(1)** read with **§14(3)**
[38] **§ 42**
[39] See **Law Society of The Transvaal v Machaka and Others (No 2) 1998 (4) SA 413 (T)** at 416

[42] It may of assistance to examine the roadmap of representation ascending from the work floor up to the Industrial Court of Appeal.

(1) Parties

[43] The workplace law concerns first and foremost, employees and employers.

43.1 The definitions in the **2000 IRA** of "***employee"*** i.e., ***"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"*** and ***"employer***" i.e., ***"a person who employs another person as an employee or any person so acting on behalf of an employer"*** have not varied much since 1980. The more detailed definition of ***"employer"*** in the Employment Act has consistently applied since 1980, reading:

> ***"any person or undertaking, contractor, corporation, company, public authority or body of persons who or which has entered into a contract of employment with an employee and includes –***
> ***(a) Any agent, representative, foreman or manager of such person, undertaking, corporation, public authority or body of persons who is placed in authority over that employee; and***
> ***(b) In the case of any such person –***
> ***(i) Who has died, his executor; (ii) Who has become of unsound mind, Curator Bonis; (iii) Who has become an insolvent. the trustee of his insolvent estate;(iv) Which is a company in liquidation, the liquidator of the company."***

43.2 The 2000 IRA defines "***officer***" as:

> ***"a person who holds an office in a federation, a trade union, staff association, employers' association and includes a member of a committee of a trade union, staff association or employers' association, federation or a person employed by such a body in a full time or part time capacity."***

43.3 An employee is a natural person who renders personal services.

43.4 An employer can be a natural person or a juristic person and bodies such as employee or employer organisations, or CMAC are juristic persons. Juristic persons cannot act otherwise than through representatives duly authorized to act as such on their behalf. Examples of such authorized representatives are directors or other employees of companies or other corporate bodies; employees or office bearers or officials of urban and public authorities; and office bearers or officials of employee or employer organizations.

43.5 The Government can be an employer and the Labour Commissioner or the Minister can be a party to legal proceedings but not necessarily *qua* employer, and generally will be represented by a legal practitioner from the Chambers of the Attorney-General, who as a matter of law represents the Government in courts or in any legal proceedings to which Government is a party.[40]

(2) Representation Within the Workplace

[44] The applicable spheres would include negotiation, consultation, grievance and disciplinary procedures and proceedings. Generally, representation of a party originates from within the relevant institutional or industry specific ambits.

44.1 Representation in dispute resolution and disciplinary proceedings by fellow employees or office bearers of industrial organisations, i.e., by lay persons, is at the order of the day. Representation by legal practitioners is permitted

[40] **§ 77(5)(c)** of the **Constitution, 2005**

only in certain special circumstances, with reference for instance to ***Sazikazi Mabuza v Standard Bank Swaziland***. [41]

44.2 Already in the workplace, an unequivocal distinction is drawn between "***lay representation"*** and ***"legal representation"*** as set out by ***Grogan*** [42] and in the ***Sazikazi Mabusa*** case; there is no grey coloured ***"semi"*** or ***"in-between."***

(3) Who may report a dispute

[45] *Post* 1980, the operation of the statutory machinery is invoked by the reporting of a dispute to the Labour Commissioner. Such a report may be made *only* by an ***"employer; employee; collective employee representative; Works Council, Joint Industrial (later Joint Negotiating Council) member; where no collective representative, another active organisation relating to employees"*** and as from 2000, also an applicant for employment in respect of a dispute concerning unfair discrimination under the Employment Act. [43] This is the first narrowing down of the cast of the actors on the workplace stage.

(4) Extra-Curial Representation: Conciliation, Mediation and Arbitration

[46] The **1963 Proclamation** provided that:

> ***"A person having an interest may, by attorney or advocate, be represented in any proceedings or enquiry held under this Proclamation."*** [44]

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[41] ***(Unreported IC Case No. 311/2007)*** **at Paragraph 24**

[42] **WORKPLACE LAW** at p.240

[43] **1980 IRA - § 57; 1996 IRA - § 50; 2000 IRA - § 76**

[44] **§ 27(3)**

[47] The **1980 IRA** and the **1996 IRA** are silent on the subject of extra-curial representation but the **2000 IRA** sets out a clear position, being:

47.1 In **conciliation proceedings:**

> "***… a party to the dispute may appear in person or be represented only by co-employees or by members, office bearers or officials of that party's organisation and, if the party is a juristic person, by Directors or employees***" although "***a party may be represented by another person in conciliation proceedings if the parties to such proceeding agree to such representation."*** [45]

47.2 In **arbitration proceedings:**

> "***… a party to a dispute may appear in person or be represented by a legal practitioner or persons authorized by the party"*** [46]

[48] The **CMAC** Rules in **Rules 17** and **26** contain similar provisions. As regards conciliation, **Rule 17 (5)** provides further that: "***The commissioner may call upon the representative to establish why the representative should be permitted to appear in terms of this rule"*** and **Rule 17(6)** stipulates that:

> "***A representative must tender any documents requested by the commissioner in terms of sub-rule (5), including constitutions, payslips, contracts of employment, documents and forms, recognition agreements and proof of membership of a trade union or employers' organization."***

[49] It is established law that representatives of juristic parties cannot embark on frolics of their own but need to be duly authorized. In respect of arbitration proceedings, a party may appear in person or be represented by a legal practitioner or persons authorized by the party.[47] The only authorized persons, it seems, would then be those who by necessity have to be formally

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[45] **§ 81(3) & (4)**

[46] **§ 17(4).** The apparent reason why representation by a legal practitioner is not permitted as of right in conciliation proceedings but is so permitted in arbitration, would be because conciliation is reconciliatory and pacifying in nature whereas arbitration is more coercive - *Cf* **Commission for Conciliation, Mediation and Arbitration and Others v Law Society of The Northern Provinces 2014 (2) SA 321 (SCA)** at Paragraph 4.

[47] **§ 17(4)**

authorized to represent juristic parties, within the employment and workplace context set out above.

(5) Who has Recourse to the Industrial Court

[50] Continuing the restrictions, the Legislature permits only the following to sue or be sued in the Industrial Court: an employee, an employer a trade union, staff association, an employers' association, an employees' association, a federation, the Commissioner of Labour or the Minister. [48]

50.1 It will be noted that **section 10** refers to a party without defining same. Only the natural and juristic persons who may sue or be sued in the Industrial Court, can be parties and it is trite that juristic parties cannot act other than through their duly authorised representatives.

50.2 It is par for the course that affidavits on behalf of juristic persons contain an allegation that the deponent is duly authorized to depose to the affidavit on behalf of the party and alert legal practitioners are quick to take absence of proof authority, such as a company resolution, as a point *in limine*. This is how ***"authority"*** generally is understood by the Courts and by legal practitioners.

[48] **§ 8(2)**

D.5.2 INTRA-CURIAL REPRESENTATION REFERRED TO IN THE ACT AND RULES

D.5.2.1 General

[51] As seen above, the definition of "***Court"*** in the **2000 IRA** is the Industrial Court.

[52] Representation of parties before ***"Court"*** under the **1980 IRA** and the **1996 IRA** respectively, and subject to Court Rules, were stipulated to be that:

> "… ***any party to any proceedings brought under this Act may be represented before Court by a legal practitioner or any other person authorized by such party"*** [49] and "… ***any party to any proceedings brought under this Act before the Court may represent himself or herself or be represented by a legal practitioner or any other person authorized by such party."*** [50]

[53] The pertinent provision in the **2000 IRA** is **section 10** which for the reasons aforestated, does not apply to the Industrial Court of Appeal.

[54] As for the Court Rules:

54.1 In terms of the **Industrial Court** Rules[51] ***"legal practitioner"*** is assigned the same meaning as in the Legal Practitioners Act and ***"party"*** is defined as ***"any party to Court proceedings and includes a person representing a party."***

54.2 In terms of the **Industrial Court of Appeal** Rules,[52] ***"Appellant means the party appealing from a judgment and includes his legal representative;" "Counsel" includes and***

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[49] **§ 15**
[50] **§ 7**
[51] **Rule 2**
[52] **Rule 2**

advocate and an attorney; "party" means any party to the appeal and includes his legal representative."

[55] The **2000 IRA** does not mention representation before the Industrial Court of Appeal. Neither, for that matter, does any provision of the **Court of Appeal Act, 1954** or the **High Court Act, 1954** govern representation before a court; the Legislature has entrusted the regulation of such procedural matters to the makers of Court Rules where the Act is silent thereon.

[56] The following Rules of the I**ndustrial Court of Appeal** are identical to the **Supreme Court**'s Appeal Rules and it is common cause that only Counsel may represent litigants in the Supreme Court.

56.1 The **Rule 2** definitions of "***Appellant," "Counsel"*** and ***"party"*** alluded to above. [53]

56.2 **Rule 11**: ***"Any party to an appeal may…file with the Registrar a declaration in writing that he does not wish to be present in person or by counsel on the hearing of the appeal ..."***

56.3 **Rule 12:** "***The Industrial Court of Appeal may allow an amendment of the notice of appeal and arguments, and allow parties or their counsel to appear, notwithstanding any declaration made under Rule upon such terms as to service of notice of such amendment, costs and otherwise as it may think fit***"

[57] Forms in the **ICA** Rules that refer to a party and his/her Counsel only, are: **Rule 9, Form 3 - leave to appeal;** [54] **Rule 16, Form 5 – extension time to appeal;**[55] **Rule 18, Form 6 – taking additional evidence; Rule 23, Form 7 - variation.**

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[53] Paragraph [32]
[54] Relating to leave to appeal which is no longer applicable in terms of the 2000 Act
[55] *Ditto*

D.5.2.2 Section 10

[58] Mr Dlamini's argument to the effect that "***any other person authorized"*** under **section 10** by some form of osmosis acquires right of appearance in this Court, cannot be sustained:

[59] Firstly, **section 10** plainly and distinctly for the reasons set above, does not apply to this Court. The section cannot be imported into this Court *via* a back door either.

[60] Secondly, even had **section 10** found application in this Court, *obiter*:[56]

60.1 From the outset, any suggestion that ***"any person"*** means any random person whatsoever, resulting in a "*free for all*," would lead to insensible or unbusinesslike results. Mr Dlamini evidently appreciated this, hence his creation of a category of persons with ***"Mr Dlamini legal capacity"*** as being the persons who may be authorized to appear in Court. As a starting point, the answer must be sought in the **2000 IRA** and the Employment Act, which are statutes designed for workplace matters, and the first port of call must be reference to representatives other than legal practitioners.

60.2 In proper context of the Act and of the workplace, reference to such authorized representation would be a reference to a person who has a relationship, in employment or industrial context, with a party that is a juristic person or who holds a public office such as a corporate employer, a

[56] See Paragraph [33] *supra*

trade union, a staff association, an employers' association, an employees' association, a federation, the Commissioner of Labour or the Minister.

60.3 Further, this reference excludes any external person. Representatives of juristic persons such as directors or officials or office bearers or officers, already are involved in a legal relationship with the juristic person that they are to represent. They cannot act as they please because they are fully accountable to their paymasters for their work performance (at the risk of disciplinary action including dismissal.) They usually are not remunerated or otherwise rewarded in addition to their usual remuneration, such representation falling within their job descriptions.

60.4 That such authorization is confined to the workplace context set out above, is fortified by the relevant provisions of the **South African Labour Relations Act,** [57] **section 161** of which representation in the Labour Court to:

> ***"(a) a legal practitioner; (b)a director or employee of the party; (c) any office-bearer or official of that party's registered trade union or registered employers' organisation; (d) a designated agent or official of a council; or (e) an official of the Department of Labour,"*** [58]

who may not to charge a fee unless expressly permitted by Order of Court. [59]

60.5 Similar provisions in respect of representation excluding external persons can be found amongst others, in the **Namibia Labour Court Rul**es (Rule

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[57] No 16 of 1995

[58] which is made applicable to the Labour Appeal Court by **section 178.**

[59] **§ 61(2)**

4), **section 28** of the **Lesotho Labour Code Order, 1992** and **section 92** of the **Zimbabwe Labour Act, 1985.**

60.6 A system of representation in court orchestrated and operated by random outsiders:

(1) that runs parallel with and equal to the system of representation by fully qualified professionals who are accredited by the Legal Practitioners Act to practice law; and

(2) where the outsiders with impunity can charge members of the public however much they wish; and

(3) where the outsiders enjoy all the privileges of legal practitioners but are not subject to the same requirements for qualification, or restrictions, obligations, trust accounts, fidelity certificates, accountability, ethical standards, fees committees, disciplinary measures removal from the roll and being barred from practice, and so forth; and

(4) where litigants enjoy no protection whatsoever such as provided for in the Legal Practitioners Act in respect of matters involving legal practitioners; and

(5) where an aggrieved client has no remedy but to try to formulate a cause of action to seek redress in Court (e.g., on which basis to sue a dental assistant for a dental procedure usually executed by a dentist, when the procedure had gone wrong and the patient knew or should have known that the assistant

was not properly qualified and accredited by the Medical and Dental Council to perform the procedure;) and

(6) where such a practice poses a menace not only to the unsuspecting public and the public interest, but also to the time-honoured profession of ethical practice of law in accordance with the Legal Practitioners Act; and

(7) where is no such similar system permitted, as far as could be established, in other Roman Dutch rooted systems,

will -

(a) make a mockery of the spirit and purpose of the Legal Practitioners Act, which perhaps is why Mr Dlamini had been at pains to erase this staunch legislation from the equation.

(b) Even worse, to permit such a state of affairs would violate the fundamental and entrenched constitutional right of duly admitted legal practitioners, as enshrined in **section 32(1)** of the Constitution, to practise their profession and to carry on a lawful occupation, trade or business.

(c) This is to be read with the right of the community to demand that standards be set for professions, not only relating to competence but also with regard to unimpeachable integrity.[60]

[60] See **Law Society of The Transvaal v Machaka and Others (No 2)** ***supra***

(d) **Section 268(1)** of the Constitution demands that the existing law (*in casu* the **2000 IRA)**, as far as possible shall be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring it into conformity with this Constitution. To throw wide open the doors of the Court to such external persons, would run counter to this injunction.

[61] The Court has referred to the manner in which Mr Dlamini conducted himself, in some detail.

61.1 Had Mr Dlamini been a legal practitioner, his conduct could have been referred to the Law Society for appropriate actioning and, dare one say, Mr Dlamini probably would have behaved better in the first place, had there had been a spectre of accountability hanging over his head.

61.2 However, Mr Dlamini is not a legal practitioner and there is no regulating body applicable to him and persons like him; he is accountable to no one. Hence Mr Dlamini with impunity calls himself a lawyer; charges members of the public for litigation services; comes to Court unprepared and with half-baked haphazard arguments revealing shocking ignorance of the law; and treats the court room as his playpen, showing scant regard and little respect for the dignity and authority of the Court.[61]

[62] The crucial features of this matter are the following: Firstly, labour legislation is concerned with the persons, natural or juristic, expressly identified therein with reference to who may report a dispute and who may

[61] The Court must add that it is not suggested that all persons in Mr Dlamini's circle conduct themselves in the same manner; it was simple happenstance that Mr Dlamini was the external person before Court when the issue was considered.

sue or be sued in the Industrial Court. Secondly, juristic persons can act only though duly authorised representatives. Thirdly, the milieu is the workplace, and not the common marketplace. Fourthly, there is no place for external persons within the parameters of the Act and the only outside involvement expressly provided for, is participation by legal practitioners, who ***per se*** are associated with litigation and whose appearance in Court is commonplace and uncontroversial.

[63] The absence of legal representation does not and should not translate into lesser prospects of success for a party; Courts are and remain duty bound to provide support and assistance in order to ensure a fair hearing. The Courts however are not and should not be obliged to suffer whatever the ingenuity of non-accountable non-legal practitioners who hold themselves out to be "*lawyers"* of sorts, may suggest.

[64] *Obiter*, therefore, even had **section 10** applied in the Industrial Court of Appeal, external persons such as Mr Dlamini would/should not enjoy right of appearance through "*authorization"* by a party.

D.5.3 CONCLUSION AS TO *"LEGAL REPRESENTATIVE"*

[65] In the context of litigation, which is what Courts and legal practitioners specialise in, the Courts and legal practitioners have always understood ***"legal representative***" and ***"legal representation"*** to refer to legal practitioners i.e., to attorneys and advocates, collectively referred to as "***Counsel."*** This also is expressly stipulated in the Magistrates Court Rules.

65.1 The plain meaning is also reinforced by the fact that the only subsequent references in the Rules of this Court and its forms to persons who are not litigants, are references to Counsel.

65.2 Trustees and so forth, for purposes of litigation, are representative litigants, and not legal representatives. This is acknowledged also in the definition of ***"employer***" in the Employment Act, to wit:

> "… ***(b) In the case of any such person – (i) Who has died, his executor; (ii) Who has become of unsound mind, Curator Bonis; (iii) Who has become an insolvent. the trustee of his insolvent estate;(iv) Which is a company in liquidation, the liquidator of the company."***

[66] Mr Dlamini's argument appears to be, once person is authorized by another to do something, that they become a legal representative of that person for all intents and purposes.

66.1 Once again, no person can bestow a right that is not recognised in law and as had become customary, Mr Dlamini could not refer to a single case or authority in point which could support his contention.

66.2 The fact that a person, for instance, may authorize any other person to collect a registered letter from the post office on behalf of the first mentioned person does not mean that said person can authorize any such random person to appear on their behalf in the courts.

66.3 It goes without saying that no person, and *in casu* no employee, employer or any other party in court proceedings under the **2000 IRA,** can confer a right of appearance on another where the law does recognise such a right.

66.4 Mr Dlamini's attempt unilaterally to create a category of persons with ***"Mr Dlamini legal capacity***" who may be authorized at will, falls at the same hurdle. There is no such legal provision and a Court is not obliged to permit infiltration of any supposed right of appearance which is not recognized by the law.

66.5 In any event, as regards the "***Mr Dlamini legal capacity"*** creation, the question would be which criteria would govern its assessment and who the supposed assessor/s and enforcers thereof would be.

[67] It then follows that "***legal representative***" for purposes of this Court, can mean "***Counsel"*** only i.e., attorneys and advocates duly admitted as legal practitioners, and it is so held accordingly.

D.6 BECOMING A PARTY TO PROCEEDINGS BY VIRTUE OF AUTHORISATION

[68] Mr Magagula palpably hit the nail on the head when he submitted that a person cannot be both a party and party's representative at the same time and this aspect, including the convoluted arguments by Mr Dlamini in this regard, does not require further consideration.

D.7 SECTION 11 OF THE INDUSTRIAL RELATIONS ACT, 2000

[69] This section commences as follows

: "***11.(1) The Court shall not be strictly bound by the rules of evidence or procedure which apply in civil proceedings and may disregard any technical irregularity which does not or is not likely to result in a miscarriage of justice."***

69.1 Firstly, ***"Court***" is defined in **section 2** as the Industrial Court and secondly, as seen above, right of appearance is not a mere technical irregularity.

69.2 **Section 19(2)** provides, as regards this Court, that: "***The Industrial Court of Appeal, in considering an appeal under this section, shall have regard to the fact that the Court is not strictly bound by the rules of evidence or procedure which apply in civil proceedings."*** The clear intention is aimed at the appeal itself and this sub-section merely confirms what is stipulated in **section 11** in respect of the Industrial Court.

[70] Mr Dlamini's somewhat sensational declaration that "*... should the Court issue a judgment that any other authorized person cannot appear in this Court that will result in a miscarriage of justice and even abuse of court process or even attempting to defeat, obstruct the administration of justice, that is in terms of criminal law, my Lord"* is bizarre and seemingly plucked out of thin air, with no authority to support it. It cannot be taken seriously.

E CONCLUSIONS

[71] In view of all the aforegoing, the Court concludes and holds that:

(1) The Court may *mero motu* raise the issue of right of appearance.

(2) The Court is not bound by judgments made *per incuriam* or *sub silentio.*

(3) The Legal Practitioners Act, 1964 finds application in respect of the Industrial Court and the Industrial Court of Appeal.

(4) **Section 10** of the Industrial Relations Act, 2000 does not find application to the Industrial Court of Appeal but only to the Industrial Court.

(5) Reference to ***"legal representative"*** in the Rules of the Industrial Court of Appeal, is reference to duly admitted legal practitioners as meant by the Legal Practitioners Act, 1964 and only such practitioners are permitted to represent a party in the Industrial Court of Appeal.

(6) Mr Dlamini is not a legal practitioner and as such enjoys no right of appearance in this Court.

RULING

[72] Accordingly, the following Ruling is made:

(1) It is ruled that Mr S B Dlamini does not enjoy a right of appearance in the Industrial Court of Appeal.

(2) No order as to costs.

_____
J.M. VAN DER WALT
JUSTICE OF APPEAL

I agree

_____
N. NKONYANE
JUSTICE OF APPEAL

-I agree

_____
D. MAZIBUKO
JUSTICE OF APPEAL

For the Appellant: No legal practitioner

For the Respondent: Mr. H Magagula of Robinson Bertram Attorneys

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