IN THE INDUSTRIAL COURT OF APPEAL OF ESWATINI

JUDGMENT

Case No. 16/2022

In the matter between:-

WATERFORD KAMHLABA UNITED WORLD COLLEGE OF SOUTHERN AFRICA **Appellant**

and

PHILANI HLOPHE **Respondent**

Neutral citation:	Waterford Kamhlaba United World College of Southern Africa v Philani Hlophe *(16/2022)* [2023] SZICA 11 (21 April 2023)
Coram:	**S. NSIBANDE JP, N. NKONYANE JA AND A.M. LUKHELE JA**
Date Heard:	**16 MARCH 2023**
Date Delivered:	**21 APRIL 2023**

Summary: *Labour Law – deduction of personal loan from gratuity payable upon end of contract – interpretation of Section 56 (1) (d) of The Employment Act 3/1980 and applicability of the provisions of Section 32 (2) (a) and (b) of the Retirement Fund Act 2005 – An employer may not make deductions from remuneration of his employee unless he has consulted the employee and has been given permission to do so; or where the law or Court Order permits him to do so. Appeal and cross appeal dismissed, no order for costs.*

JUDGMENT

A.M. LUKHELE J.A.

INTRODUCTION

[1] This is an appeal against the judgment and orders of the *Court a quo*, per Ngcamphalala, AJ., sitting with nominated members, delivered on the 3rd June, 2022 in which it, *inter alia*, granted the orders sought by the Respondent.

BACKGROUND FACTS

[2] In the Court *a quo*, the facts of the matter were largely common cause. The facts were that:-

2.1. The Respondent was employed by the Appellant on the 1st September 2019 on a fixed term contract of thirty-six (36) months in the position of a teacher;

2.2. The Respondent worked for the Appellant up until the 28th April 2020 wherein the Respondent advised the Respondent that the contract of employment was not going to be renewed;

2.3. Clause 10 of the contract between the parties provided that:-

"The Employee shall be entitled to gratuity equivalent to 25% of the basic salary, including any allowance noted in section A of this contract;

2.4. At the time of the termination of the contract the Respondent earned a salary of E25,486.76 per month;

2.5.1. During the subsistence of the contract the Respondent applied for and was granted a loan which was to be payable by way of monthly deductions from the Respondent's salary;

2.5.2. The agreement between the parties was that the amount would be deducted monthly from Respondent's salary until it was paid in full.

2.5.3 It appears that the parties did not envisage a situation wherein the employment contract could be terminated while the loan was outstanding. There was no clause as to what will happen in such an eventuality;

2.6. Upon Appellant's termination of the contract the Appellant calculated the amounts payable to the Respondent as gratuity to be sum of E40,286.76 (Forty Thousand Two Hundred and Eighty-Six Emalangeni Seventy-Six Cents);

2.7. Instead of paying the sum of E40,286.76 (Forty Thousand Two Hundred and Eight Six Emalangeni Seventy-Six Cents) to the Respondent, the Appellant, without consulting with the Respondent withheld these amounts and deducted the monies from Respondent's gratuity to settle the outstanding loan which Respondent had with the Appellant. The deduction of the aforesaid amounts was unilateral and was without Respondent's consent. The Respondent alleged that the withholding of his benefits was unlawful and wrongful.

[3] On the basis of the aforesaid facts the Respondent launched proceedings in the Court *a quo* against the Appellant on which he claimed payment of the amounts as withheld by the Appellant. He argued in the Court *a quo* that the withholding of his funds was wrongful and unlawful.

[4] In its judgement, the Court *a quo* found for the Respondent, holding the withholding of Respondent's gratuity to be wrongful and granted the orders sought.

[4.1] The judgment and orders of the Court *a quo* now have culminated in this appeal.

GROUNDS OF APPEAL

[5] The grounds of appeal, as set out in the Notice of Appeal are as follows: -

"1. The Court a quo erred in law and in fact in holding that Section 51 (1) (d) of The Employment Act 1980 is only applicable to deduction of wages where consultations have taken place and the parties have agreed on the deductions.

2. The Court a quo erred in law in applying the provisions or relying on the provisions of The Retirement Fund, 2005 in the present matter, yet the matter was clearly for deductions of wages to an employee and not pension or retirement benefits. The Court a quo ought to have found in terms of Section 51 (1) (d) of the Employment Act 1980, the Appellant had to only give notice of the deduction of wages.

3. *The Court a quo erred in law in holding that before a deduction is made on an employee's gratuity, there should be a judgement that has been obtained in a court of law, and alternatively there should be an acknowledgment by the employee acknowledging culpability. The Court a quo ought to have found that Section 51 (a) (d) of The Employment Act 1980 does not require a judgment or an acknowledgment of culpability, before an employer can effect a deduction of wages, agreed upon.*

4. *The Court a quo ignored the authority in the judgment of* ***MBONI DLAMINI AND TWO OTHERS VS. THE MINISTRY OF ECONOMIC PLANNING AND DEVELOPMENT AND TWO OTHERS*** *[2017] SZIC 42 on the correct interpretation of wages which is applicable in casu and wrongly applying and relying on an irrelevant statute.*

5. *The Court a quo erred in law holding that the High Court is the appropriate Court to entertain the Appellant's counterclaim and that it did not have the jurisdiction to do so."*

[6] On the other hand, the Respondent has filed a cross appeal against the Order of the Court *a quo* on the issue of costs. The grounds of appeal on costs are that:-

GROUNDS OF CROSS APPEAL

[7] *"1.1. The Court a quo erred in law and misdirected itself in finding that the circumstances of the case before it did not warrant the granting of costs at punitive scale yet the jurisprudence and/or legal authorisation of the Court a quo and of this Honourable Court are clear that conduct of an employer who resorts to self-help and withholds an employee's salary and/or due payments without a Court Order is punished with a punitive costs order in the event that such an employee litigates to enforce his rights as the Respondent did in the Court a quo.*

1.2. The Court a quo ought to have ordered the Appellant (Respondent in the Court a quo) to pay costs of the Respondent (Applicant in the Court a quo) at Attorney-Client scale as prayed for in the Notice of Motion in Prayer 2."

THE PARTIES CONTENTIONS

APPELLANT'S ARGUMENTS

[8] The Appellant's main arguments in his Heads of Arguments and on appeal is that the Court *a quo* erred in its judgment and in making the orders in holding that **Section 56 (1) (b) of the Employment Act of 5/1980 (as amended)** is only applicable to deductions of wages where consultation has taken place and where the parties have agreed on the deductions.

RESPONDENT'S ARGUMENTS

[8.1] On the other hand, the Respondent argues that the Court *a quo* was correct in its judgment and in making orders and finding that before there is a deduction in terms of **Section 56 (1) (2) of The Employment Act 5/1980 (as amended)**, there must be consultation between the Employer and Employee and there must be agreement on the deductions.

[8.2] The Respondent also argues that it was entitled to be granted costs by the Court *a quo.*

PRELIMINARY REMARKS

[9] As regards the Notice of Appeal and the grounds set out therein parties are reminded that utmost care should be taken in drafting such grounds. The sentiments of this Court as expressed in ***IRENE NXUMALO VS. ESWATINI ROYAL INSURANCE CORPORATION AND ANOTHER*** *(20/2022) [2022] SZICA 14 - (17/02/2023)* once again bears repeating in this judgment, viz:-

> *3.1.2. It is not the duty or obligation of this Court to infer or to articulate a question of law from stated grounds of appeal; it is the duty of an Appellant or their Counsel to clearly and succinctly set forth same in the notice of appeal."*

[10] In this case the Notice of Appeal quotes and relies on **Section 51 (1) of The Employment Act** as the applicable section and for Appellant's contentions ground of appeal. The applicable section is not **Section 51** but is **Section 56 (1) of The Employment Act. 5/1980 (as amended).**

[11] Having expressed the aforegoing sentiments, fairness and justice enjoins the Court to deal with each of the grounds of appeal raised as against the correct applicable **Sections of The Employment Act 5/1980 (as amended).** This should in no way create a precedent for future matters.

ISSUE ARISING ON APPEAL

[12] The issue that arises in this appeal, is whether the Court *a quo* erred in finding that the deductions carried out by the Appellant were lawful either in terms of the common law or in terms of the provisions of **The Employment Act, 5/1980 (as amended).** If lawful, were such deductions carried in accordance with fair procedure?

CONSIDERATION OF THE GROUNDS OF APPEAL AND FINDINGS

GROUND OF APPEAL NO. 1 – DEDUCTIONS IN TERMS OF SECTION 56 (1) (d) OF THE EMPLOYMENT ACT, 1980.

[13] The crisp issue before the Court *a quo*, and indeed in this Court was, and is whether the Employer was entitled in law to deduct the wages of the employee in the manner it did;

[13.1] The Appellant's argument on this ground is that on the established facts the Court *a quo* erred in law and misdirected itself in holding that **Section 56 (a) (d) of The Employment Act 1980 (as amended)** is only applicable to deductions from wages where consultations have taken place and the employer and employee have agreed on such deductions being effected.

[13.2] The Court *a quo* in its judgment concluded that:

> *"18. As alluded previously Section 56 (1) (d) provides for the deduction of monies owed to an employee, however same can only be done where consultations have taken place between the parties and the parties have agreed on such deductions."*

[14] The Court will proceed to consider the common law and statutory position on this subject.

COMMON LAW POSITION

[15] In **The Guide To South African Labour Law 2nd Edition, Alan Rycroft and Barney Jordan P.97** states the common law position as follows:-

> *"The common law prohibits unilateral deductions from an Employees' Wages for liquid claims, but allows for deductions by consent and by way of set off."*

[15.1] In **the Law of South Africa Volume 13 (first re-issue) by W.A. Joubert paragraph 561 at page 248** it is stated that:-

> *"An employer may not make any deduction from an employee's remuneration, unless the employee agrees in writing to the deduction in respect of a debt specified in an agreement or the deduction is required or permitted in terms of a law, a collective agreement, a Court Order or an Arbitration Award."*

[15.2] The common law rule therefore is that *prima facie* all deductions from employees' wages are unlawful.

STATUTORY POSITION

[15.3] In Eswatini, the statutory position on deduction of wages is contained in **Section 56 of The Employment Act 5/1980 (as amended)**. This Section lists the circumstances under which the law authorises an employer to make deductions from the wages of an employee.

[15.4] Section 56 (1) and (2) provides that:-

"56. (1) An employer may deduct from the wages due to an employee –

(a) any amount due by the employee in respect of any tax or rate which the employer is required to deduct from the wages of an employee under any law;

(b) any amount due to the employer in respect of a contribution to the Swaziland National Provident Fund;

(c) the actual or estimated cost to the employer of any materials, clothing (other than protective clothing required to be supplied by the employer under any law or under the provisions of a collective agreement), tools and implements supplied by him to the employee at the latter's written request and which are to be used by the employee in his occupation;

(d) any money advanced to the employee by the employer, whether paid directly to the employee or to another person at the employee's written request, in anticipation of the regular period of payment of his wages;

(e) any amount paid to the employee in error as wages in excess of the amount due to him.

(2) Any employer may, with the written authority of an employee, deduct form wages payable to that employee, such amount as is stipulated in the authority as being the amount due from the employee as his membership fee or contribution to an organisation of which the employee is a member."

[15.5] The provisions of this Section and all the provisions of Part VI of the Act *"Protection of Wages"*– were promulgated to prohibit certain deductions from the wages of an employee, even where such employee has consented to the deduction being made.

[15.6] In **P. RAMUNTU FREIGHT SERVICES (PTY) LIMITED V. HLATSHWAYO (IN RE: HLATSHWAYO V. P. RAMUNTU FREIGHT SERVICES (PTY) LIMITED** (366/2005) [2006] SZIC 89 (07/12/2006) P.R. Dunseith J.P (as he then was) quoted with approval the reasoning of Rose Innes J. in **NEW RIETFONTEIN GOLD MINES VS MISNUM** *1912 AD 74 A at 709* where the Judge said:-

"Clearly the object of the clause read as a whole was to save the employee from himself and to protect him against his employer or

others with whom he might be induced to have dealings by ensuring that money earned by him should (subject to specific exceptions) pass directly and without deduction into his own hands."

[15.7] Generally, the position of the law therefore is that an employer may not make deductions from the remuneration of his employee unless he has been given permission to do so or where an Act or Court Order permits him to do so (see **SMALL VS. NOELLA CREATIONS** (1986) 7 ILJ 614 IC at 618).

[15.8] Also, where the common law rules do not permit set-off to apply, the employer may not make deductions from an employee's remuneration without his consent.

[16] In interpreting **Section 56 and the provisions of Part VI of The Employment Act 5/1980 (as amended)**, the core intention must always be borne in mind and must seek to achieve the following attributes, viz:-

(1) deductions from employee's wages have to be regulated in order to protect workers from arbitrary and unfair deductions, which would amount in effect, to an unjust decision in remuneration.

(2) deductions from wages to be lawful, need an appropriate legal basis e.g., laws authorising such deduction or collective agreements or consent of employee;

(3) all authorised deductions from employees' wages must be limited to ensure that the net number of wages received by an employee should in all cases be sufficient to ensure a decent living income for those employees and their families and such net remuneration should not be diminished by deductions to such an extent as to render meaningless the right of employees to receive and dispose their wages.[1]

[17] Utmost care should always be taken by an employer who deducts the wages or benefits of an employee and such employer must ensure that the deduction is authorised by law. Wages are by nature protected by law. This is meant to protect the employee.

[18] The prohibition against deduction which is contained in **Part VI of the Act** is not an absolute one. It is subject to the contrary provisions contained in any law. It is accordingly subject to the provisions of **Section 56 as read with 64 of the Act**.

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1. Deductions from wages and The attachment and assignment of wages – ILO report (13) 2023 – Chapter IV En-Doc

[19] In *casu* the Court must consider whether the employee was consulted before the deduction was made from his salary. The Appellant argued that the employee was consulted. To the contrary, the Respondent argued that the employee was not consulted and indeed did not consent to such deduction being made and did not even know that such deduction was to be made.

[19.1] **Section 64 (c) of The Employment Act 5/1980 (as amended)** provides that any employer who makes any deduction from the wages of the employee or receives any payment from any employee contrary to the Provisions of Part VI of the Act (which includes Section 56) shall be guilty of an offence.

[19.2] In argument the Appellant has relied on a letter (Annexure "PH2") written to the Employee as proof that there was consultation of the employee. The contents of the letter advise the Respondent of the fact of termination of the contract. The calculation of the benefits due to the Respondent and also advises him of the fact of the deduction of the amount.

[19.3] In **ARCHIE SAYED V. USUTU PULP COMPANY (PTY) LIMITED** *(433/06) [2006] SZIC 10 (07/08/2006)* per P.R. Dunseith J.P stated that consultation was:

> *"An opportunity to express its opinion or make representations, with a view to taking such an opinion or representations into account. It certainly does not mean merely affording an opportunity to comment about a decision already made and which is in the process of being implemented."*

[19.4] The Court, in **REGISTRAR OF THE HIGH COURT AND TWO OTHERS V. SABATHA FAITH GUMEDZE (5/2013) [2013] SZICA 1 (29/10/2013)** the Court quoted Grogan J. in his book Dismissal – Juta and Company P.362, where the Author stated that:-

> *"The ultimate test is whether the Employees were given a reasonable opportunity to make representations on the issues over which they are entitled to consult. Consultations will seldom be deemed sufficient when it is rushed or perfunctory."*

[19.5] In the instant case, on reading annexure "PH[2]", relied upon by the Appellant and considered by the Court *a quo*, I have no doubt that the Employee was not consulted prior to the deduction of the gratuity being made. This letter only informs the employee about the deduction by the

employer and, gives no option whatsoever to the employee either to oppose or make any representations about such deduction.

[19.6] Apart from being not consulted the procedure embarked upon by the Appellant in effecting the deduction is not satisfactory and cannot be said to be fair and in accordance with the spirit of **The Employment Act 5/1980 (as amended)** and our **Industrial Relations** which is based on fairness of a decision being made..

[19.7] The deduction could not be said to be fair and reasonable in terms of **Section 57 (3) of The Employment Act 1980** as the entire gratuity was deducted. This left the Respondent with nothing at the end of the day.

[19.8] In **HOPESON DUMSANI GULE V. TEACHING SERVICE COMMISSION AND OTHERS (166/2012) [2012] SZIC 20 (19/07/2012)** Nkonyane J. (as he then was) had this to say:-

> *"[15] The Court is being called upon to consider whether the transfer was substantially and procedurally fair. Substantive fairness requires the Court to consider whether there was a valid reason for the transfer. Procedural fairness requires the Court to investigate whether the correct procedures were followed,*

including consultation with the Applicant, before the decision to transfer the applicant was taken."

[20] With regard to procedural fairness, it is now, well established law that to be consulted before an adverse decision is taken is so fundamentally important in the context of industrial relations that only exceptional circumstances will warrant a decision being taken without proper consultation (See **ALPHEOUS THOBELA DLAMINI V. DALCRUE HOLDINGS (PTY) LIMITED) (382/2004) [2008] SZIC 29 (12/03/2008)**.

[21] In the instant case, the Court is of the view, that the deduction was one that is prohibited by law and **Section 56 (1) (d)** and not fair in **terms of Section 57 of The Employment Act 1980 (as amended)** as it was not communicated in advance to the employee.

[22] The Appellant failed to prove before the Court *a quo*, lawful reasons for the deduction of the Respondent's gratuity. The Court *a quo* was correct in dismissing Appellant's argument on this ground. The argument raised by the Appellant is devoid of any merit. Therefore, Appellant's appeal stands to fail on this ground.

[23] For completeness, the Court will now proceed to consider the rest of the grounds of appeal as raised in the notice of appeal.

GROUND OF APPEAL NO. 2 – SECTION 32 (2) OF THE RETIREMENT FUNDS ACT (2005)

[24] **Section 32 (2) of the above Act** provides that:-

"A retirement fund may deduct an amount from its members' benefits in respect of:-

(a) an amount representing the loss suffered by the Employer due to unlawful activity of the member and for which judgment has been obtained against the member in a Court of law or written acknowledgement of culpability has been signed by the member and provided that the aforementioned written acknowledgment is witnessed by a person selected by the member and who has had not less than eight years of formal education.

(b) an amount for which the employee is liable under a guarantee issued by the employee for purposes of obtaining a housing loan. Provided that an original notarised document exists, which confirms that the guarantee was made."

[25] In **TWIGG V. ORION MONEY PURCHASE PENSION FUND AND ANOTHER (1) [2001] 12 BPLR 2870 (PFA) JOHN MURPHY,** the

Pensions Fund Adjudicator, while considering a similar provision had this to say:-

> *"20. Section 37 A of the Act establishes a general principle in terms of which the right to a person's benefits may not be reduced whatsoever other than the limited instances set out in the Section itself. The Section, inter alia, permits as an exception a deduction from a pension benefit for certain specified debts owing by the member, provided that the requirements contained in Section 37 D are met. In terms of Section 37 D (b) before a fund may deduct from a member's benefit, it has to comply with the following requirements:-*
>
> - *there must be an amount due by a member to his Employer on the date of his retirement or on which he ceases to be a member of the fund;*
>
> - *the amount must in respect of compensation in respect of any damage caused to the Employer;*
>
> - *the damage caused to the Employer must be by reason of theft, dishonesty, fraud or misconduct by the member;*
>
> - *the member must either admit liability in writing to the Employer or judgment must be obtained in any Court;*

- *the judgment or the written admission of liability must be in respect of the compensation due in respect of the damage cause.*

If these conditions are met, the fund may deduct the amount due by the member to the Employer from the member's benefit payable in terms of the rules and pay it to the Employer."

[26] In *casu* in its judgment the Court *a quo* considered the applicability of the provisions of The Retirement Fund and the instances in which an Employer may deduct outstanding loans and amounts from its Employee and the Court ruled that the Appellant did not meet the requirements of the relevant Act. In addition, the Court found that no evidence was produced by the Appellant that it has consulted the Respondent before such a deduction was made or discussed the matter with the employee. The Court found that the provision of **Section 32 (2) (b)** cannot come to the assistance of the Appellant in that instance.

[27] Having considered the arguments of both parties and the circumstances of this case, the decision of the Court *a quo* cannot be faulted. Appellant's appeal on these grounds stands to be dismissed.

[27.1] We will further add that, in view of the Court *a quo's* finding on **Section 56 (1) (d)**, it was not even necessary for that Court to consider the arguments on this ground.

GROUND OF APPEAL NO. 3

[28] The Court *a quo* ignored the authority in the judgment of **MBONI DLAMINI AND TWO OTHERS V. THE MINISTRY OF ECONOMIC PLANNING AND DEVELOPMENT AND TWO OTHERS (79/2017) [2017] SZIC 42 (09/06/2017).**

[28.1] Even though no point of law is alleged to have been violated by the Court *a quo* worthy of consideration by this Court, the Court will consider the argument raised on appeal only as a question of interpretation of the MBONI CASE and its applicability in the instant case.

[28.2] In this Court Mr. Kunene submitted that the MBONI CASE is authority for the proposition that either consultation or the notification of the employee will suffice and notification will amount to consultation.

[28.3] Even though the relevant portion of the **MBONI DLAMINI AND**

TWO OTHERS V. THE MINISTRY OF ECONOMIC PLANNING AND DEVELOPMENT AND TWO OTHERS 2017 SZIC 42 (09/06/2017) judgment was quoted in argument; sight was lost on the fact that that judgment left the issue of consultation and notification open. Sibandze AJ in that case did not decide that relevant issue as it is raised now. The Court merely said:

> *"15. We are in agreement with Mr. Jele that some form of consultation may be necessary or at the very least, notification to the Employees, however, we need not decide that in this matter because the Employee wrote to each of the Applicants and informed them of its intention to recover the misdirected payments from each of them, giving them ten (10) days to object in terms of the internal grievance procedure which they did not do so."*

[29] The facts in the **MBONI DLAMINI** case (supra) differs in many respects from the instant case in many respects of much importance is that, *in casu* no consultation took place at all, the Employee was only informed of the result of the deduction. He was not given any opportunity to make representations to the Appellant. In any event at the time of the deduction the Respondent was no longer an Employee and no grievance procedure or representations could have been applicable to the Respondent to reverse the decision already taken. On the facts of this case, it should follow that this ground should also fail.

GROUND OF APPEAL NO. 4

[30] This ground of appeal relates to the refusal of the Court a quo to entertain the counter-claim by the Appellant.

[31] In **SWAZILAND FRUIT CANNERS (PTY) LIMITED V. VILAKATI PHENEAS AND ANOTHER ICA 2/1987 1987-1995 SLR. VOL 2 AND at PAGE 81 HANNAH CJ** (as he then was) stated that:-

> *"Not every party to an Industrial dispute is entitled to have the dispute determined by the Industrial Court. Looking at the matter generally, the policy of the Industrial Relations Act is that before a dispute can be ventilated before the Industrial Court it must be reported to the Labour Commissioner who is obliged to conciliate with a view to achieving a settlement between the parties. Where the conciliation is successful machinery exists for the agreement arrived at to be made an Order or Award of Court but where the dispute remains unresolved the Labour Commissioner is obliged to issue a Certificate to that effect and then and only then, may application be made to the Industrial Court for relief."*

[32] It is settled that the Industrial Court can only entertain a dispute between an Employer and Employee after such dispute shall have been conciliated upon without same getting resolved so as to result in a Certificate of Unresolved being issued. This is a statutory and policy requirement.

[33] In the present appeal although the dispute between the parties regarding the deduction of the wages was referred and considered by C.M.A.C. and a Certificate issued, the issue forming the basis of the counterclaim was not reported as a dispute to C.M.A.C., the issue of the counterclaim was therefore not raised and considered by C.M.A.C. The fact that the issue forming the basis of the counterclaim was not reported and dealt with by C.M.A.C. and no Certificate of Unresolved Dispute was issued means that the Court *a quo* could not take cognisance of the counter-claim (See: **HUB SUPERMARKET (PTY) LIMITED/MCCARTER 18/2005 [2006] SZICA (1 MAY 2002).**

[34] In **SWAZILAND DEVELOPMENT AND SAVINGS BANK V. SWAZILAND UNION OF FINANCIAL INSTITUTIONS AND ALLIED WORKERS UNION CASE NO. 419/05 SZIC (27/02/2005)** at pages 7 and 8 Nderi Nduma President (as he then was) said:-

"The argument appears attractive but fails closer scrutiny in my view. The Court needs to see on the face of the Certificate what specific dispute has been certified as unresolved. Looking at this particular certificate it is clear that the issue it describes as not having been resolved i.e. "failure and/or neglect by Respondent's Bank to effect increments in May 2005" has since been resolved when the payment was made.

The Court cannot countenance that other disputes that may not have been resolved but not specified in the certificate are outstanding and therefore capable of enforcement by way of a strike action.

The fact must be apparent on the face of the document. Failure to so appear means that the dispute has not been certified as unresolved and the strike cannot lawfully proceed on the basis of the certificate."

[35] We are of the view that the Court *a quo* correctly held that it could not take cognisance of the counterclaim. For these reasons ground of appeal No. 4 should also fail.

CROSS APPEAL AND COSTS

[36] The next issue to consider is the cross appeal filed by the Respondent and the issue of costs on appeal.

[37] The Respondent's ground of case appeal is that in the circumstances of this case, the Court *a quo* ought to have granted him cots and such costs should have at the Attorney and Client Scale.

[38] In argument, Mr. Simelane relied on the case of **ESWATINI NATIONAL TRUST COMMISSION V. NOLUTHANDO HLOPHE (3/2019)**

[2019] SZICA 10 (16/10/2019) and on **Section 64 (a) of The Employment Act 5/1980** argued that Appellant's conduct in deducting Respondent's wages in the manner it did deserves censure because the Appellant failed to pay what was lawfully due to the Appellant and the reasons advanced for withholding the gratuity did not exonerate Appellant from an award of costs against it, at punitive scale for that matter. A matter involving payment of wages which are unlawfully withheld should attract costs, so the argument went before this Court.

[39] It is an established principle of law that costs are at the discretion of the Court hearing the matter and Court on appeal should only interfere with an Order for costs if it is shown that a decision regarding costs is arbitrary and worthy of interference by a Court on appeal (See **NEDBANK SWAZILAND V. SANDILE DLAMINI N.O. (144/2010 [2013] SZHC 30 (28/02/2013) AND LUMBELA GENERAL TRADING AGENTS V. SWAZILAND INDUSTRIES AGENCIES (PTY) LIMITED AND OTHERS** (668/2018) and **SIKHUMBUZO THWALA V. PHILILE THWALA (NEE DLAMINI) (101/12) [2013] SZHC 13.**

[40] It is also trite, and it will be accepted, that in labour matters the general principle that costs follow the event does not apply in a labour court and in

exercising its discretion to award costs will do so reservedly and in well considered circumstances and in accordance with the requirements of the law and fairness. (See **GEN V SHELL UK LIMITED [2] EWCA CIV (479) [2003] IRLR 88 AND THE MINISTER OF PUBLIC SERVICE AND TWO OTHERS VS. SWAZILAND NATIONAL ASSOCIATION OF TEACHERS (03/2017) [2018] SZHC 91 (3/2018).**

[41] It is trite that the grounds upon which the Court may order a party to pay his opponents Attorney and own client costs include that the party has been guilty of dishonesty or fraud and that his motives have been vexatious, reckless malicious or frivolous or that he has misconducted himself gravely either in the transaction under enquiry or in the conduct of the case (See **HERBSTEIN (supra) at 718**). It has been held that Attorney and client costs may be awarded on the grounds of dilatory or mendacious conduct on the part of an unsuccessful litigant. (See **WARD V. SLIZER 1973 (3) SA. 801 A at 760 H).**

[42] Similarly there must be considerations of fairness and justice made for orders of costs to be made against a party. The consideration must not just be a punitive one unless good cause exists.

[43] In the instant case the Court *a quo* considered the issue of costs as it had been argued by both parties to grant costs after weighing all facts pertinent on the matter the Court found that it should not grant cots at all. The prayer for punitive costs was also refused. It is clear that the issue of costs was on the mind of the Court and same was fully considered.

[44] In any event in the circumstances of the case an Order for costs would hardly be fair in view of the fact that the Respondent still owes the Appellant for the outstanding loan and no payment arrangements have been made.

[45] Sitting on appeal, this Court cannot fault the Court's reasoning and orders on the issue of costs. There is no misdirection entitling this Court to interfere with that Court's discretion in not awarding costs. In our view the Court *a quo's* decision was judiciously exercised and must be left intact. The costs order is in accordance with the dictates of fairness and justice of this matter.

[46] This is also not an appropriate matter where costs should be made against any of the parties in this appeal. Accordingly, no costs order on the appeal will be made.

CONCLUSION AND ORDERS

[47] For the aforegoing reasons, the Court is satisfied that the decision of the Court a quo was correct. The Court will therefore dismiss the appeal and the cross-appeal and make no order for costs.

[48] In the result:-

1. **The appeal and cross appeal are dismissed.**
2. **There is no order as to costs.**

A.M. LUKHELE JA

I agree

S. NSIBANDE JP

I agree

N. NKONYANE JA

For Appellant:	Mr Siphesihle Kunene (K.N. Simelane Attorneys (in Association with Henwood & Company)
For Respondent:	Mr S.M. Simelane (S.M. Simelane & Company