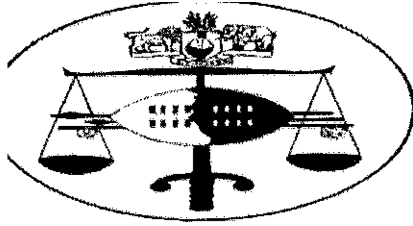

IN THE SUPREME COURT OF ESWATINI

HELD AT MBABANE CASE NO.70/2020

In the matter between:

NEDBANK SWAZILAND LIMITED	Appellant
And	
PHESHEYA NKAMBULE	First Respondent
PRESIDENT OF THE INDUSTRIAL COURT	Second Respondent
N.R. MANANA N.O.	Third Respondent
M.P. DLAMINI N.O.	Fourth Respondent
THE ATTORENY GENERAL	Fifth Respondent

Neutral Citation: *Nedbank Swaziland LTD vs Phesheya Nkambule and Four Others (Appeal Case 70/2020)* [2021] SZSC15 (1st September 2021)

Coram: S.P. DLAMINI JA, S.J.K. MATSEBULA JA AND N.J. HLOPHE JA.

Date Heard: 20th May 2021

Date Handed Down: **1'1 September 2021**

SUMMARY

Civil Appeal against a judgment of the High Court reviewing a judgment of the Industrial Court - Contending that an employee was involved in a stratagem to systematically delay finalization of a disciplinary hearing during which he was suspended with pay, thus allegedly ensuring he got paid a salary without working for as long a time as possible, to the employer's prejudice, the employee allegedly embarked on a process that culminated in the stoppage of the employee's salary as the suspension persisted.

The Employee instituted proceedings at the Industrial Court to compel the payment of his salary during his suspension as well as to interdict the stoppage of same during that period - First Respondent's salary stoppage came about amidst several applications instituted in court by the latter challenging his disciplina1y process for one reason or the other, with some judgements therefi"om getting pronounced after a lengthy delay - In the application to compel salary payment the Industrial Court found in the employee's favour and ordered the payment of his arrear salaries brought about by the long wait for the judgements in court plus those of the further months going forward.

Appellant took Industrial Court's judgment on review to the High Court which confirmed it -Appellant noted an appeal to this Court hence this judgment-Both the Industrial Court and the High Court had found that the payment of salaries

during the suspension was necessitated by Section 39 (2) of the Employment Act of 1980 which provided that an employee's salary may not be withheld beyond one month during his suspension. They declined to interpret the Section to come up with a different meaning claiming that to do so would be tantamount to Judicial overreach of the Legislature.

Whether both the Industrial Court and High Court were correct in their conclusion- Whether or not it should matter if the employee had systematically embarked on the exercise to prejudice the Appellant whilst benefitting himself unduly.

Although there is no proof that the First Respondent embarked on a systematic stratagem to unduly benefit himself, it is equally correct that the Appellant was, like the pt Respondent, not to blame for the long delay in taking the matter forward whilst awaiting judgments ji·om the various courts approached by the first Respondent. The non-payment of the pt Respondent's salary during that period cannot fairly and equitably be blamed on the Appellant in such circumstances nor would it be fair and equitable for the first Respondent to benefit fi·om the inordinate delay in handing down the judgements concerned. - It is only fair and equitable that none of the parties should be seen to be penalized for the prejudice arisingfi•om the delayed judgments, just as none should be seen to be benefitting therefi·om.

Accordingly, it is only fair that the period that endured as a result of the delay in pronouncing the judgements neither benefits nor prejudices any of the parties.

JUDGEMENT

HLOPHEJA

[l] This matter brings into sharp focus the meaning and effect of Section 39 (2) of the Employment Act of 1980, particularly whether or not it can be interpreted to allow the withholding of an employee's salary during the tenancy of his suspension from work pending the finalization of a disciplinary hearing if it can be shown that he had embarked on a systematic stratagem to ensure a delayed conclusion of the matter so as to unduly benefit himself at the employer's expense.

[2] At the time the First Respondent instituted the Industrial Court proceedings that culminated in the current appeal before this Comi, he was in the employ of the Appellant where he held the position of Head of Retail Sales which is a senior position in the Appellant Bank's structure, being the Second in command after the Chief Executive Officer in the establishment structure of the Appellant Bank.

[3] Around December 2018, the First Respondent was implicated in a case of misconduct at the Appellant's undertaking where the latter was allegedly defrauded a sum of around E3 Million. This resulted in the First Respondent being placed under what was termed as a precautionary suspension. In simple language he was placed on suspension pending investigations. After conclusion of the investigations, he was charged with misconduct as a result of which his suspension continued except that it was at that stage pending finalization of a disciplinary hearing. It continued being with pay.

[4] The disciplinary proceedings in question commenced in February 2019, with the :chairperson having been sourced from the Republic of South Africa. It is unclear from the facts whether he was an employee of the sister entities of the Appellant based there, or he was a person considered knowledgeable on such matters but independent of the Appellant. All the Appellant said in his papers at some point is that the chairperson was an independent person which unless explained did not mean much as every person chairing a disciplinary hearing, whether or not employed or engaged by the employer for that purpose, is required to be independent in the performance of his duties as a disciplinary chairman.

[5] The facts as pleaded by the parties show that when the hearing commenced, the First Respondent, through his legal representative, raised an objection against the chairperson, who was asked to recuse himself on allegations of bias. Upon the objection being dismissed by the chairperson, an urgent application was instituted against the appellant bank by the First Respondent under case number 63/2019. It is not in dispute that this aspect of the matter was subsequently settled amicably between the parties with the chainnan in question being withdrawn. The Appellant says that this was done without necessarily accepting that there was anything wrong with the Chairperson than to prevent the disciplinary proceedings becoming protracted. As those proceedings were launched, the disciplinary proceedings were postponed and thereby delayed.

[6] When the reconstituted disciplinary hearing commenced around April 2019, it is contended that the First Respondent once again raised preliminary objections which after the chairperson had dismissed, he asked for written reasons for the ruling. It is argued this was abnormal as it was not consistent with the usual procedure in disciplinary hearings as such reasons would form pait of the final written 1uling or decision by the chairperson. This had allegedly resulted in an inevitable delay in the finalization of the disciplinary hearing. When the said reasons were not

availed per the request, the First Respondent instituted urgent proceedings at the Industrial Court under case number 143/2019, seeking an order compelling the appellant to avail him the written reasons.

[7] Again this Application was settled amicably between the parties. The Appellant says that they decided to avail those reasons again to avoid the disciplinary hearing becoming protracted and getting out of hand than as an admission of responsibility to provide the reasons in question. As soon as he had received the said reasons, the First Respondent instituted review proceedings to the High Court under case no. 851/2019, challenging the decision that had resulted from the reasons in question. This was on the 27th May 2019. It was finally heard on the 5th or 6th June 2019. The judgment thereto was handed down on the 9th December 2019 with the result that the application was dismissed. It had therefore taken about 7 months to finalize that application. Fairness dictates that this should be construed as much as possible to the detriment of both paiiies given that none of them can be said to have had control on when the judgment could be handed down. In shoti, just as none should be prejudiced by the delay in coming up with the judgment then none should benefit therefrom.

[8] Although the papers do not elegantly come out with the necessary particulars, it is not in dispute that sometime between February 2019 and the end of May 2019 (that is before the last of the three applications referred to above), about three incidents, which allegedly contributed individually to the delay of the disciplinary proceedings referred to above, occurred. This delay, the Appellant attributed to the respondent who however, denied responsibility. Although the dates are not so clear, it is apparent those occun-ed between the first three application proceedings filed by the Respondent during the tenancy of the disciplinary hearing which must have been sometime between February and May 2019.

It is contended by the Appellant that in the first such incident, the First Respondent could not avail himself for a scheduled disciplinary hearing claiming to be indisposed. That necessitated a postponement which brought with it the attendant delay. Although a questionable medical certificate is alleged to have been produced by the First Respondent to motivate for the postponement, it is noteworthy that the postponement prayed for was granted and there does not appear to have been any conditions for the said postponement attached to the decision.

The second incident that brought about another alleged lengthy delay

was when a postponement of the disciplinary hearing was sought on the ground

that the First Respondent's attorney was unavailable to represent him during the hearing. Not much detail has been given about that incident except that the postponement appears to have been granted unconditionally.

The third incident of delay came about when the First Respondent allegedly failed to attend the hearing, claiming to have had to take his child for medical attention in the Republic of South Africa. It appears again that this postponement was granted unconditionally once again although the appellant now wants to hold the consequent delay against the First Respondent.

[9] As indicated, these three incidents which according to the Appellant contributed markedly to the lengthy delays and were allegedly indicative of an abuse of the process by the First Respondent, are not fully particularized. The dates on when they occurred have not been provided for the court to easily understand how long a time each such incident took including why if the appellant had allowed such postponements, it could then avail him to complain about them for the comi to find they were an abuse of the process to force an undue delay. It is also unclear when the First Respondent had been notified about the hearing dates among other

things, in order to assess the authenticity of the reasons behind the postponements.

[10J This I say being alive to the fact that all these three incidents complained of would have occun-ed following the hearing being reconvened after the respondent would have taken the matter to court complaining of one thing or the other as alleged in the three applications brought to court between February 2019 and June 2019. The postponements brought about by the incidents now complained of appear to have been regarded as normal at the time.

[11] It is equally notew01ihy that the First Respondent is nowhere during the period between February 2019 and June 2019, shown as having been responsible for the delay. In fact, we are not told if at any point during the incidents allegedly resulting in the delays complained of, the First Respondent was ever told that the paiiicular postponement of the matter being granted was going to result in the variation of the suspension with pay to one without pay if it was being persisted with.

[12] The facts reveal that sometime before argument of the application brought to the High Court under case No. 851/2019 to review the decision of the chairperson's refusal to uphold the points in limine he had raised, that is the one eventually heard on the 5th or 6th June 2019 with a judgment being handed down later in December 2019, and precisely around May 2019, the employer, the Appellant , called upon the First Respondent to show cause why his suspension with pay could not be varied to one without pay. This has been referred to as the process to vary the terms of the suspension by the Appellant. It is not in dispute that the outcome of that exercise was the variation of the terms of the suspension from one with pay to one without pay.

[13] Although the exact dates have not been supplied in the facts, it is not in dispute that the decision to vary the terms of the suspension with pay to those of suspension without pay, was challenged at the Industrial Court under case no. 205/2019, whose fate was a dismissal with a referral of that dispute to the Conciliation Mediation and Arbitration Commission (CMAC). After conciliation, CMAC issued a certificate of an unresolved dispute. First Respondent once again instituted an application at the Industrial Court challenging the decision varying the suspension to one without pay. This was sometime in October 2019. The judgment to this

application was handed down on the 6th March 2020 by the President of the Industrial Comt. That judgment was in the First Respondent's favour and it set aside the decision of the Appellant which had varied the terms of his suspension to one without pay from one with pay. The said Judgment of the Industrial Court is the one that formed the basis of the application for review before the High Comt which culminated in the judgment that formed the basis of this Appeal. I will have to retmn later to this aspect.

[14] As the judgment to the application filed at the High Comt under case no. 851/2019 was awaited, (that is the one for the application argued on the 5th or 6th June 2019), following a stay of the disciplinary process, the Appellant around July 2019 or so allegedly commissioned a forensic audit at its unde1taking whose result allegedly implicated the First Respondent in a series of acts of misconduct, which had allegedly occasioned Appellant a financial loss in excess ofE16 Million.

[15] This finding resulted in disciplinary charges being preferred against the First Respondent. At the disciplinary hearing that followed, an objection to the said charges on the basis that they amounted to the same charges as those he had challenged and was currently awaiting a judgment, being

reinstituted against him. He had viewed those as being irregular against

him. His objection in that regard was dismissed by the Chairperson. This resulted in the First Respondent instituting fmther application proceedings at the High Cou1t under case No. 1242/2019 challenging the decision of the chairman. These proceedings were launched on the pt August 2019 whilst the judgment for the matter argued on the 5th or 6 th June 2019 was awaited. They were dismissed by the High Court after it found that it had no jurisdiction to hear the matter on the 6th May 2020.

[16] In answer thereto the First Respondent instituted a further application in the Industrial Comt seeking the same relief he had sought at the High Cou1t. That application was dismissed on the 15th June 2020 by the Industrial Comi. An appeal which has not been concluded was noted at the Industrial Court of Appeal. The conclusion of the above proceedings paved a way for the disciplinary hearing against the First Respondent to commence. It commenced thereafter and was concluded on the 20th September 2020 with the dismissal of the First Respondent from the Appellant's employ.

[17] Whereas the Appellant wants to say that the various processes taken by the First Respondent, challenging the disciplinary proceedings against him were an abuse of the court process and were calculated to prejudice it by

enabling First Respondent unduly draw a salary without providing a service for as long a time as possible; the First Respondent submitted differently. The latter saw it as an exercise of a right to protect his employment which he felt was threatened.

[18] In setting aside the Appellant's decision varymg the terms of the suspension from being one with pay to one without pay, the Industrial Court said the following at paragraphs 11,12 and 13 of its judgment handed down on the 6th March 2020, which is significant for purposes hereof given that the High Court per Mabuza J merely confirmed that decision with some slight addition as shall be seen hereinafter:-

> *"11. Our section 39(2) is clear (sic) an employer who intends to invoke the provisions of the section does not have unfettered powers. The suspension without pay cannot exceed a period of one month. There is no reason, in our view to go beyond the normal meaning of the section so as to give it any other interpretation. The Court's jurisdiction to promote harmonious Industrial Relations and to issue appropriate orders, does not give it power to issue orders that are outside the law. To inte1pret Section 39(2) in any other way other than that it limits suspension without pay*

to a period not exceeding

one month would be judicial overreach into the area of the legislature. We are not entitled to do so.

"12 In any event, even from the angle of fairness, as we were implored by the respondent's attorney, the continued suspension of an employee does not have detrimental effect for an employer only. An employee suspended on suspicion of having committed a fi•aud, suffers fi·om reputational damage fi·om which he cannot recover easily. This is particularly so where the employee is at Senior Managerial level. He cannot be equated to a man sitting at home on holiday. His professional growth is threatened and he suffers mental anguish brought about by the employer's accusation. It is in his interests also, that the disciplinary hearing be finalized timeously. As he fights for his career, he is entitled to protect his right to a fair hearing. It seems to us that to withdraw the applicants' salary by changing his terms of suspension to suspension without pay and indefinitely, is contrary to Section 39 of The Employment Act and amounts to the Applicant being penalized for challenging the fairness of the process the employer is taking him through.

13. In the circumstances, we direct that the Respondent reinstates the Applicant's salary forthwith with effect from his July salary. This includes all benefits due in terms of his contract of employment".

[19] Other than confirming the above sentiments and findings or conclusions of the Industrial Coutt, the High Court per Mabuza J had the following to say in addition, at paragraphs 34 and 35 of its judgment handed down on the 27th October 2020:

"34 I sympathize with the Applicant who is bleeding financially. I agree that there seems to be no provision that protects and cushions an employer when an employee employs delaying tactics during the determination of a disciplinary hearing. Even if this court were to conduct the inquiries referred to and come to the conclusion that fault was to be attributed to the 1'1 Respondent then what?

35 The Court a quo correctly pointed out that it could not change the law as this would be tantamount to judicial overreach into an area of the Legislature. Therefore, pursuing either inquiry

would have served no useful purpose because the end result would have been the same. It is the Legislature that should be approached to even the playing field in order to protect and give comfort to employers. In the present circumstances it cannot be the court a quo nor even this court. "

[20] I cannot agree that in a case where the period that led to the First Respondent being owed 14 months arrear salaries could be blamed on neither the employer (Appellant) nor the employee (The First Respondent), there would be no reason to interpret the Section in question to give it a purposive meaning or interpretation. I take it that just as it would be unfair for the Appellant to suffer prejudice as a result of the conduct of a third party it had no control over, it should be unfair for the First Respondent to benefit from the prolongation of that period by the intervention of that same third party when none of them could control the situation. In my view to hold otherwise would mean that the purpose of the Industrial Comi to promote harmonious, fair and equitable Industrial relations through the making of appropriate orders is not being achieved. There definitely should be instances where Section 39(2) should be interpreted so as to come up with a fair outcome in an appropriate matter where none of the pa1iies should realistically take the blame.

[21] Whereas the First Respondent cannot be faulted for having challenged any act that illegally threatened his right of being employed, the same thing should be said of an employer who played no part in the length of the period that lasted from the delay in issuing relevant judgments by the court thereby delaying the finalization of the matter, as was the case with a great part of the 14 months that endured as the matter could not be taken f01ward without the said aspect having been concluded.

[22] I note that the comi a quo observed per Judge Mabuza that the Section as it stood did not protect and cushion an employer from the delaying tactics of an employee. It therefore cannot be fair in an appropriate case for the court not to properly interpret the said section so as to attain the purpose of our current Labour relations as expressed in the Industrial Relations Act, namely the attainment of fairness and equity. I therefore cannot agree with the comi a quo's assertion that even if it were to conduct an inquiry and find some irregularities on the pa1i of the employee, it would have no power to interpret that section. That was in my view tantamount to the court a quo abdicating its primary function to achieve the ideal envisaged by section 4 of the Industrial Relations Act 2000 as read with section 39 (2) of the Employment Act of 1980.

[23] Section 4 of the Industrial Relations Act, 2000 provides as follows: -

"purpose

4. *(1) The purpose and objective of this Act is to:* -

(a) *promote harmonious Industrial relations.*

(b) *promote fairness and equity in labour relations; (c)* ....

(d) Provide mechanisms and procedures for speedy resolution of conflict in labour relations;

(e) ....

The above quoted objectives of section 4 of the Industrial Relations Act 2000 are relevant for the purposes of this judgment which although dealing with section 39 (2) of the Employment Act, the conduct it regulates is in the context of industrial or labour relations. Courts should not shun their responsibilities where the circumstances require interpreting a provision of the relevant Act where an unfair and inequitable result in its application is inevitable or where a conclusion which would defeat the objectives of the Act is about to be yielded. The court may not hide behind celebrated epithets such as "giving effect to a provision where there is no ambiguity

or to plain language of the statute" the courts must do more in order to "promote fairness and equity" in labour relations as empowered by the applicable legislation and not to be limited to the foregoing principles. Other cannons of interpretation require the court to seek the "legislative intent" or to find the "mischief' that was meant to be cured by the promulgation of the provision in question.

[24] This court has opted to search for the mischief that necessitated the enactment of subsection (2) of Section 39 of the Employment Act 1980. The provision paitly reads as follows: -

"Suspension of an employee.

39 (])An employer may suspend an employee form his employment without pay where the employee is-

(a) remanded in custody; or

(b) has or is *suspected of having committed an act which, if proven, would justify dismissal or disciplinary action.*

(2) If the employee is suspended under subsection (1) (b), the suspension without pay shall not exceed a period of one month.

[25] Subsection 1 of section 39 empowered an employer to suspend an employee without pay in limited instances. This was in a case where the employee had been remanded in custody or where the employee had committed an act which if proved against him, he or she may be dismissed. In the latter case however, the suspension without pay is limited to a period of one month. It is obvious that the idea was to ensure that the employer who as a dominant party would be in control of the disciplinary proceedings, does not unduly subject an employee to a period of nonpayment of a salary for a period exceeding one month during the suspension. An obvious implication in this was the fact that the disciplinary process of the employee would likely be completed within a period of one month with an appropriate decision being taken. A further implication of this situation was that should the disciplinary process not be concluded after one month (obviously as a result of an employer failing to control the exercise so that it is completed within the said period), he would then have to pay the salary for the period that goes beyond the one month.

[26] This was expressed in the promulgation of section 39(2) of the Employment Act, whose aim was therefore to curb the "mischief' as would arise from a disciplinary process not concluded within one month as a result of an employer's excesses or shortcomings. Subsection (2) of section

39 was therefore not meant to punish an employer for all and any suspension of an employee that goes beyond one month, just as it was not meant to benefit an employee for all and any suspension without pay exceeding one month including one where the employer was not to blame or where such a delay was brought about by the intervention of forces outside the control of the parties.

[27] I agree with the submission by Mr Jele, counsel for the Appellant, that the prevailing position of our law which persisted as at the time of the promulgation of section 39 (2) of the Employment was that the institution of comi proceedings during the tenancy of a disciplinary hearing so as to interfere with an incomplete disciplinary process was not normal. The employer was at that stage entitled to exercise managerial authority or managerial prerogative with the employee being entitled to challenge only the outcome of a disciplinary process he was unhappy with as opposed to an ongoing disciplinary process. A typical case in point upholding or

emphasizing that position was that **ofBongani Mashwama and Others V Swaziland Electricity Board, Industrial Court of Appeal Case No. 21/2000**

[28] The effect of a disciplinary process not susceptible to a challenge in Court during its tenancy was obviously that it would be commenced and concluded within one month hence the promulgation of section 39(2) of the Employment Act of 1980.

[29] It is a fact that the said position of our law has changed over the years as can be seen from the position as espoused by among other judgments, that of **Sazikazi Mabuza vs Standard Bank Swaziland and Another, Industrial court case no. 311/2001** which introduced, in this jurisdiction, the institution of proceedings challenging an incomplete disciplinary process in "exceptional circumstances". It was possibly the fluidity of the phrase "exceptional circumstances" that has seen the growth in matters challenging incomplete disciplinary processes of late with the attendant extension of the disciplinary process period and the related increase in the period of suspension of an employee pending the finalization of a disciplinary process. The change in the earlier position of the law, should bring with it the need to scrutinize the circumstance of each pa1iicular matter to determine whether a delayed conclusion of a disciplinary process as a result of the institution of proceedings should be construed against the employer or the employee.

[30] I should not be understood to be saying that merely because the delay resulted from a challenge of a disciplinary process in court by an employee, then that ought to be construed against the employee. I am aware that there are indeed exceptional circumstances where the institution of such proceedings by an employee in court would be necessary in the vindication of that employee's rights. I cannot agree with the assertion that courts have no power to interpret section 39 (2) of the Employment Act even in a case of abuse of the process by an employee simply because the Act provides as it does. That asse1iion cannot be correct. The cou1i should be able to interpret the section in light of prevailing circumstances in a given case so as to curb the mischief. The longstanding principle of our law is that 'no one should be allowed to improve his own condition by his own wrong doing'. Cases advancing this principle include **Swaziland Electricity Board and Another V Malesela Technical Services (PTY) LTD and Others (1183/05) [2005) SZHC 1 and that of Wimbledon Lodge (Pty) LTD v Gore NO. and Others (2003) 5 SA 315 at 321 G.**

[31] In the latter case, (that is the Wimbledon Lodge (PTY) LTD v Gore N.O. and Others case (supra)) the principle aforesaid was expressed in the following manner:-

"Can this be countenanced? I think not. I am content to start with Roman Dutch Law. In D50 .17.134.1 Ulpian tells us "nemo ex suo delicto meliorem suam conditionem facere potest" rendered in Waston Translation as : "no one is allowed to improve his own condition by his own wrong doing. " This fundamental principle of our law has been applied expressly in the case of ***North West Provincial Government and Another V Tswana Consulting CC*** **and Others 2007 (4) SA 452"**

[32] In so far as the comt *a quo* sought to confirm that an interpretation of Section 39(2) would amount to a judicial overreach of the Legislature, I cannot agree. When the purpose of the said interpretation would be to address an obvious mischief, including a drive to achieve the ideals put f01th by section 4 of the Industrial Relations Act 2000, our Courts should be able to address that. This comt was referred to an aiticle by Andrew Burrow bearing the tittle: - **"The Relationship Between The Common Law and Statute In The Law of Obligations (2021) 128 LQR 232** in an endeavor to drive home the point that it is imperative for a comt to interpret a statute so as to achieve its meaning or purpose: -

"The existence of a statute is rarely a good reason for denying a notional development of the common law. Reasoning to that effect

has seriously tarnished some areas of the law. While factors such as impracticability and inconsistency would justify not developing

the common law, it is *misguided to see a statute as reflecting Parliament's intention that the law should be frozen as is. Leading on from that, it* is *an abdication o(Judicial responsibility for iudges, at least in the law of obligations, to decline to develop the common law on the grounds that legislation is more appropriate. Even if a statutory solution would be better, no one can predict whether legislation will or will not be passed. It* is *therefore preferable for judges to proceed as they think fit, whether the decision be in favour or against a development, ! mowing that the legislature is ji·ee to impose a statutory solution if the common law position is thought unsatisfactory or incomplete".* (emphasis have been added).

[33] I am therefore convinced that in the context of the circumstances of the matter, particularly given that at least the delay in finalizing the disciplinary process between July 2019 and June 2020 could be attributed to neither the appellant nor the First Respondent given that it was a result of an intervention by the comis which took extended periods to come up with judgments, such a delay should neither prejudice nor

benefit any of

the parties as it was clearly a result of an independent process resolving itself, albeit for too long. It is therefore important for the court in a case like the present to first determine if any of the parties was unduly responsible for the delay in the finalization of the disciplinary process to either benefit himself or to deliberately prejudice the other. I am of the view that the architect of a situation that is calculated to unduly prejudice or unduly benefit one of the parties at the expense of the other, should bear the consequences as such a conclusion would be in accord with the purpose of the Industrial Relations Act to achieve fai111ess and equity in industrial relations.

[34] In *casu*, there was an intervention by outside forces in the form of the courts taking much longer to pronounce their judgements without which the matter could not have been taken forward by either the employer or the employee. According to Section 4 (1) (d) of the Industrial Relations Act 2000, one of the objectives of the said Act is to "provide mechanisms and procedures" for speedy resolution of conflicts in labour relations. The period from June 2019 to June 2020 taken by the High Court and the Industrial courts to decide the matters having a bearing on the advancement of the disciplinary process of the First Respondent and referred to above is against the spirit of a speedy resolution of conflicts in labour relations. It

would also neither be equitable nor fair to have any of the parties either being unjustifiably prejudiced or being made to benefit unduly therefrom. The employer cannot be penalized by being ordered to pay an employee the salary for the months concerned just as it would not be equitable nor fair for the employee to benefit from the delay occasioned by the courts as their judgement were awaited.

[35] Given that I could not conclude that by instituting the proceedings in the context of this matter the First Respondent was acting unduly to prejudice the Appellant; it seems to me that the period between July 2020 and September 2020, in so far as it was about concluding the disciplinary process against the First Respondent, the latter ought to be paid the arrear salaries for those months given that the said period was spent dealing with the disciplinary process in the normal way.

[36] Before concluding this matter and noting that it has had to take an interpretation by this Court to try and attain the ideals of our labour relations as envisaged by the Industrial Relations Act, it is my considered view that the Legislature should be called upon to consider an appropriate amendment of Section 39 of the Employment Act by ensuring that it covers a situation like the one uncovered herein or one

where the

suspension of an employee is being abused by one of the parties to the detriment of the other. Accordingly, the attention of the Attorney General is drawn to this judgment for him to consider an appropriate amendment of the Section concerned (Section 39(2)) so as to attain the ideals of the Industrial Relations Act. Accordingly, the Registrar is ordered to avail a copy of this judgment to the Attorney General.

[37] Consequently I have come to the conclusion that the comi a quo should have reviewed, corrected and set aside the decision of the Industrial Comi on the basis that the said court had misdirected itself in law or had unjustifiably adhered to a fixed principle when it concluded that it could not give a purposive interpretation of Section 39 (2) of the Employment Act of 1980, yet that amounted to it abdicating its responsibilities in the context of the matter.

[38] Accordingly this cou1i makes the following order: -

1. The order of the comi a quo be and is hereby set aside and is substituted with the following order: -

1.1 The decision of the Industrial Court upholding the Application of the First Respondent asking for an interdict restraining the withholding of the First Respondent's salary during the time of his suspension and when jud ments of other comis were awaited including the order that arear salaries for the same period be paid by the Appellant be and is hereby set aside.

1.2 In so far as the delay in concluding the disciplinary proceedings between July 2019 and June 202,0 is not attributable to either of the parties, neither of them should either suffer prejudice as a result of it or benefit from it.

1.3 Given that the period between July 2020 and the end of September 2020 was attributed to an ongoing disciplinmy process after the judgments ; hithe1io awaited had been delivered, the Appellant is ordered to pay the First Respondent's arrear salaries for that period including all the benefits that would have accrued to him during that period.

1.4 Each party will bear its own costs.

N.J. HLOPHE

JUSTICE OF APPEAL

I Agree

S.P. DLAMINNI

JUSTICE OF APPEAL

I Agree

– –U L A

JUSTICE OF APPEAL

For the Appellant	Mr. Z.D. Jele
For the 1st Respondent	Mr. M.L.K Ndlangamandla
For the 2nd -5th Respondents	No Appearance