IN THE HIGH COURT OF ESWATINI

HELD AT MBABANE **CASE NO. 403/2019**

In the matter between:

GUGULETHU FAKUDZE-THWALA **Applicant**

And

SWAZILAND BUILDING SOCIETY **1st Respondent**

THE PRESIDING JUDGES OF THE INDUSTRIAL COURT OF APPEAL **2nd Respondent**

JUDGEMENT

Neutral citation: *Gugulethu Fakudze-Thwala & Swaziland Building Society/The Presiding Judges of the Industrial Court of Appeal. (403/2019) SZHC 22 (1st March 2024).*

Coram: *S.M. MASUKU J*

Date of heard: *1st December 2023*

Date delivered: *1st March 2024*

Summary: *Administrative Law – The High Court's Review Jurisdiction over Industrial Court of Appeal decisions. It is settled for now in our jurisdiction that the High Court has power to review and set-aside decisions of the Industrial Court of Appeal on grounds permissible at common law.*

Principal Issue for Review: *On a proper interpretation of section 19 (1) of the Industrial Relations Act,2000, does an appeal to the Industrial Court lie on a question of law or may the Appeal court also consider an appeal on question of fact?*

Held: *On a proper interpretation of Section 19 (1) of the Act an appeal from the Industrial Court to the Industrial Court of Appeal is circumscribed, it should be confined to questions of law. In the premises the Industrial Court of Appeal's decision on appeal was erroneous , reviewed and set-aside with costs including costs of counsel.*

Introduction and facts for the Review Application.

[1] The Applicant sought to review a judgement of the Industrial Court of Appeal ("the ICA") handed down by the court on the 24th October 2018.

[2] The Applicant was employed by the 1st Respondent as a teller at its Manzini Branch. She thereafter successively took up the following positions with the 1st Respondent. Internal auditor, Senior Mortgage Officer and Assistant Branch Manager.

[3] On the 3rd and 4th December 2008, she approved the encashment of seven cheques by a senior employee from the 1st Respondent's head office, a Mr B. S Dlamini. Such approval was given in terms of an internal facility that the 1st Respondent provided, the effect of which was to advance to staff members the cashed amounts. It is alleged that unbeknown to the Applicant, by the time she gave her approval, certain cheques for Mr Dlamini had been dishonored, a fact that was allegedly known to Applicant's immediate senior but had not been brought to her attention. The seven cheques approved for encashment by the Applicant as well as other cheques cashed at another branch were subsequently dishonored.

[4] According to the record, the 1st Respondent then ordered an investigation by an Internal Audit Manager who compiled a report on his investigation after interviewing several employees including the Applicant.

[5] In his report, the Internal Auditor Manager highlighted several weaknesses in the 1st Respondent's systems. Based on the weakness he had detected, he made *inter alia* the following recommendations (as can be ascertained from the table at page 98 of the record). Proof of availability of funds should be required when cheques are cashed; and limits for encashment of cheques should be set. He also recommended that disciplinary action be taken against some Branch Controllers, Mr Ambrose Nkambule and Mr Sam Mamba. He further recommended that disciplinary action also be taken against the Chief Accountant, Mr Zacheas Zulu. The Applicant argued that no recommendation was made that disciplinary steps be taken against her. Despite this disciplinary action was in fact taken against her.

[6] The Applicant was subsequently served with a notice to appear at a disciplinary hearing charged with gross negligence in that; she had allegedly facilitated the fraudulent encashment of seven cheques totaling to E125 000-

00 (One hundred and twenty five thousand emalangeni) by Mr Dlamini, she exceeded her limit authority in respect of the encashment; and she had failed to exercised proper, appropriate and sound judgment in minimizing or mitigating and eliminating risk to the bank.

[7] The chairperson of the disciplinary inquiry found that the Applicant exceeded her authority and had not exercised sound judgment in minimizing risk to the 1st Respondent. Her negligence, it was found however, had not been gross and taking into account her length of service and other mitigating factors, he considered that the appropriate sanction that should be imposed was to be a final warning. The 1st Respondent however proceeded against that recommendation and dismissed her. She then approached the Industrial Court ("The IC). for reinstatement and other ancillary relief.

[8] On the evidence presented before the IC, mainly by the Internal Audit Manager, the IC *inter alia* found that there was no factual basis for the accusations of negligence against the Applicant. It concluded that the Respondent had failed to prove on a balance of probabilities that the dismissal of the Applicant was for a fair reason and that taking into account all the circumstances it was reasonable to terminate her services. It ordered the reinstatement of the Applicant.

[9] Not being satisfied with the decisions of the IC, the 1st Respondent appealed to the ICA. The Applicant opposed the appeal before the ICA. One of her grounds of appeal was that section 19 (1) of the Industrial Relations Act 2000 ("the IRA") confined the ICA to determining appeal only on questions of law, whilst the 1st Respondent's appeal was on a question of fact, namely the finding on negligence. The ICA rejected this ground. It examined the amendments to the IRA, in particular section 19. The ICA in its judgement ("the impugned ICA judgement) concluded that its jurisdiction was no longer

restricted to considering appeals on question of law. It may also decide appeals on questions of fact.

[10] In its conclusion, the ICA went on to overturn the IC's finding that the Applicant had not been negligent and substituted a finding of gross negligence on the part of the Applicant.

[11] The ICA came to decide the way it did despite the ICA's past decisions (at least three of the ICA's decisions cited herein under), where it had consistently held that appeals before it were confined to appeals on points law and not on questions of fact. This had been infact the accepted interpretation of section 19 at the time the present matter came before it.

[12] The earlier cases in which section 19 (1) as amended was considered were first, Swaziland Electricity Board v Colile Dlamini, Case No.2/2007, second, Elias Velaphi Dlamini v Ministry of Justice and Constitutional Affairs and Others (6/2011) [2012] SZICA L (22 March 2012) and third The Chairman Civil Service Commission v Isaac (14/2015) [2016] ZSICA (31 March 2016). A short discussion of these cases will be canvassed later in this judgement.

[13] When formulating its decision, the ICA in the impugned judgement in paragraphs [18] –[25] placed emphasis on following issues; first, it did not regard itself to be bound by all the three of its decisions referred to above because regarding the Swaziland Electricity Board case *(supra)* it said although the court in that case referred to section 19, it did not quote the section as it was, in other words, the court said 'the judgement is glaring that not much attention was given to the section. At any rate there is no analysis of the section…' The ICA found the interpretation to have been *obiter*.

[14] Commenting on The Chairman, Civil Service Commission judgement (*supra*) the ICA in the impugned judgement said 'although the respondent raised an objection based on section 19, the respondent did not argue seriously this

point; the court concluded that this point has not been central to the case'. With regards to the Elias Velaphi Dlamini case (*supra)* it said the intention of the legislature had not been determined correctly. The impugned judgement of the ICA concluded in its interpretation of section 19 (1) that 'when appropriate regard is had to the comma, that appeared in the amended section 19 (1) by the use of comma, a litigant, may appeal on both the question of law and fact.'

The High Court' Review Jurisdiction over ICA decisions.

[15] It appears to be settled for now in our jurisdiction that the High Court has the power to review and set-aside decisions of the ICA. The latest Supreme court decision in a series that the apex court has grappled with in the matter of Nedbank Swaziland and 3 others v Phesheya Nkambule and 3 others (70/2020) [2020] SZSC 04 (27 February 2023). In that case, the Supreme Court of Eswatini held that the High Court has the power to review decisions and judgments of the IC, the Conciliation, Mediation and Arbitration Commission (CMAC) and Labour Arbitration Tribunals. It further confirmed that the High Court has the power to review the ICA as it had been confirmed by the Supreme Case of Derrick Dube and Ezulwini Municipality (91/2016) [2018]SZSC 49(30TH November 2018 at Paragraphs [95] and [97]. See also the Nedbank Swaziland judgment (*supra*) paragraph [66].

[16] A further important point to be noted regarding the review jurisdiction of this court over decision of the ICA is that in the Nedbank Swaziland judgment *(supra)* the Supreme Court overruled its decision in the matter of Cashbuild Swaziland (pty) Ltd vs Thembi Penelope Magagula (26B/2020) [2020] SZSC 31 (09/12/2021) (Cash build Swaziland).

[17] The Supreme Court in Cashbuild Swaziland had found that section 152 of the constitution, prescribing the High Court's review powers, does not apply to

the IC and ICA. It concluded that neither the High Court or Supreme Court have review jurisdiction over IC or ICA. See Paragraph [27] and [28] of the Nedbank Swaziland Judgement (*supra*).

[18] No further amount of time should therefore be spent in this judgement discussing the review jurisdiction of the High Court over the ICA other than what has been canvassed above.

Issues for the Review

[19] The Principal issue that this review raises is this. On a proper interpretation of section 19 of the IRA, does an appeal to the ICA from a judgement of the IC lie only on question of law or may the ICA also consider an appeal on question of fact.

[20] The ICA in two subsequent judgments since 2021 in different matters had occasion to consider and decide on the proper interpretation of section 19. The court considered extensively the correctness or otherwise of the its decision on the impugned judgement. It reiterated the long-standing interpretation held by the previous decisions that a proper interpretation of section 19 is that appeals against decisions of the IC are restricted to questions of law only and expressly found that he impugned decisions is wrong. (See Trevor Shongwe v Machawe Sihole and Another [2021] 08/2020 (SZICA 1 (10 August 2021); ("Trevor Shongwe") and Bhekithemba Vilakati v Eswatini Royal Insurance Corporation (02/2021) [2020] SZICA 10 (5TH April 2023). 1 ("Vilakati").

[21] The Applicant's argument placed substantial reliance on the Vilakati judgement (*supra*). It was argued for example, that the reasoning in the Vilakati Judgment is persuasive and that it ought to be accepted as the correct exposition of the law with the result that the finding to the contrary is not to be followed.

[22] The submissions made on behalf of the Applicant in the context of the proper interpretation of section 19 (1) of the IRA emanates from Her Ladyship Hon M. Van der Walt JA in the Vilakati split judgement who concluded her analysis of the relevant provision of the Act as follows;

'[31] In the premises, I am constrained humbly to hold that the Swaziland Building Society judgement clearly was wrong in this regard and should not be followed, and I accordingly so hold'.

[23] This court is called upon to embark on its own analysis on the first ground of review as set out above. The result on the review may or may not reinforce the ICA's decision by her Ladyship Van der Walt JA.

[24] I was reminded by the 1st Respondent's counsel in arguments that Her Ladyship's opinion in the Vilakati judgement was not unanimous. As it turned out her decision on the merits differed from the other two Justices of Appeal. On the one hand Hon Van der Walt JA dismissed the appeal before that court with no order as to costs on the merits of the matter.

[25] On the other hand Hon Justice Mazibuko and Nkonyeni came to a conclusion on the merits which differed from Hon Van der Walt JA and determined that the appeal succeeds with costs. In the dissenting judgement authored by Justice of Appeal Mazibuko, no reference was made to the finding by Hon Van der Walt JA relating to the proper interpretation of section 19(1) of the Act.

[26] In the circumstances it was argued for the 1st Respondent that the full court decision of the presiding Judges of the ICA is binding on this court unless this court holds, on review, that the finding of the ICA regarding the proper interpretation of Section 19 (1) of the Act is plainly wrong.

The Proposed approach for this court to follow in this Review?

[27] Although the parties support different propositions in this Review for their destined goals, they however supported one common preposition on the approach the court ought to take in adjudicating this Review.

[28] It is that this court is legitimately entitled to restrict its consideration of the matter to the first ground of Review as articulated by the founding affidavit. The submissions articulated in their heads and in argument in court is simple that this Review can be decided on the principal question of whether on a proper interpretation of section 19 of the IRA, does an appeal to the ICA from a judgement of the IC lie only on question of law or may the ICA also consider an appeal on questions of fact.

[29] The Applicant in its exposition of what it considered the proper interpretation of section 19 (1) of the Act concluded by submitting that the ICA's erroneous finding on its jurisdiction and its decision to consider and decide on the appeal are reasons enough to set aside its decision to (setting aside) the IC's order. (underlining added).

[30] Although the Applicant proceeded to argue for the sake of completeness on how grossly unreasonable the impugned decision of the ICA was, she was well confident that the Review can stand or fall on its first ground as articulated above.

[31] The 1st Respondent on the other hand criticized the Applicant for her failure to limit her Review grounds to those permissible at common law. It stated that the second to seventh grounds of review articulated by the Applicant are not grounds of review properly construed . They are an attempt (it argued) on the part of the Applicant to re-engage the merits of the decision by the ICA. In effect it said, the Applicant's impermissibly argue that the ICA came to the conclusion on the facts, and, on that basis, request this court to substitute its decision for that of the ICA.

[32] After a brief survey of the remaining grounds of review (second to seventh grounds), the 1st Respondent's counsel concluded with a reminder that these proceedings are not a forum for a critical analysis of the factual conclusions drawn by the ICA. Further that an analysis of the Applicant's comprehensive heads of argument in these proceedings affirms that the Applicant's legal representative accept that these Review proceedings are limited to the common law grounds of review *stricto sensu*.

[33] I need not discuss in detail the submissions made regarding the grounds of Review (two to seven) which the Applicant placed in addition (for the sake of completeness as argued). I am inclined to agree with the parties that the principal question is on the proper interpretation of section 19 (1) of the Act rather than to go through the process of establishing if it was wrong for the ICA to make conclusion on the facts for example, matters pertaining the factual basis on the accusation of negligence and the ICA's finding of gross negligence on the part of the Applicant. That in in itself in my view would amount to a misconstruction of what a Review court should do.

[34] The role of the High Court in its review powers can be extracted from the work by Herbstein and Van Winsen, The Civil Practice of the Supreme Court of South Africa 4th ed @ page 932. The authors stated;

"The reason for bringing proceedings under review or appeal is usually the same, to have the judgement set aside. Where the reason for wanting this, is that the court came to a wrong conclusion on the facts or the law, the appropriate procedure is by way of appeal. Where, however, the real grievance is against the method of the trial, it is proper to bring the case on review. The first distinction depends, therefore, on whether it is the result only or rather the method of trial which is to be attacked.

[35] During the course of arguments in this matter, an issue that featured prominently between the court and counsel appearing for the respective parties was this: *in what circumstances, if any would the High Court be competent or empowered to review an alleged error of law made by a lower court or administrative body?*

[36] Applicant's counsel referred the court to a leading textbook on Administrative Law, namely by Cora Hoexter and Glenn Penfold (3rd ed) Administrative law in SA, Juta. It emerges from the extract of the text book (pages 388-394)'that a distinction was historically drawn between a *jurisdictional error of law* made by an authority in determining the limits or extent of its or extent of its powers and *a non jurisdictional error of* law made in the course of deciding a matter which it had jurisdiction to decide. Jurisdictional errors were reviewable because, its authorities misinterpreted the extent of their jurisdiction, they dealt with and based their decisions on matters with which, on a true construction of their powers, they had no right to deal: In short, they took on powers that they did not have or abdicated power, that they should have exercised; they acted *unlawfully'*. However, where the error was not jurisdictional – where it was made *'within jurisdiction'* or in the course of deciding the matter- the court would not intervene lest it interferes with the merits of the decision. The attitude was that if an authority had jurisdiction to make the right decision, it also had jurisdiction to go wrong:

[37] A new approach has criticized this distinction between reviewable (Jurisdictional) and non-reviewable (no –jurisdictional) errors; Hoexter *at. al* (Ibid) page 393-394) says the distruction is often arbitrary, in that it is difficult to see why any error of law does not prevent a decision – maker from properly considering 'the matter'. In the English jurisdiction in Pearlman v Keespers and Governs of Harrow School [1979] Q B 56 at 70E, Lord Denning MR

suggested that the distinction should be discarded altogether; (see Hoexter *at.al* (Ibid) at page 393).

" The way to get things right is to hold thus: no court or tribunal has any jurisdiction to make an error of law on which the decision of the case depends. If it makes such an error, it goes outside its jurisdiction..."

[38] The Appellate Division in South Africa in the case of Hira v Booysen and Another (308/1990)[1992]ZASCA 112 (3 June 1992) Corbert CJ challenged the orthodoxy,after a thorough exposition of the case law, he concluded that the traditional detraction between reviewable and no reviewable errors was by no means a clear one. He held that the reviewability of an error of law depends essentially on whether the legislature intended the tribunal to have exclusive authority to decide the question of law concerned. This he said was a matter of construction of the statute conferring the power of decisions; (see Hoexter *at.al* I bid at page 394).

[39] In Eswatini the Supreme Court has emphasized that the review powers of the High Court is embedded in the common law and section 4 of the High Court Act 20 of 1954 and assisted by High Court Rule 53. (see paragraph [80] Derrick Dube Judgment *(supra)*. The Supreme Court in that Judgement (at paragraph [79] pronounced the review jurisdiction of the High Court as was enunciated by Innes CJ in Johannesburg Consolidated Investment Co. v Johannesburg Town Council 1903 at TS 111 at 115 where he said the following:

> *"Whenever a public body has a "**duty imposed upon it by statute, and disregards important provisions of the stature,** or is guilty of irregularity or clear illegality in the performance of the duty, this court may be asked to review the proceedings complained of and set it aside or correct them".*

[40] Similarly, without putting emphasis on the traditional distinction between reviewable and non-reviable errors, the of Eswatini in the judgement of Kukhanya (pty) Ltd t/a Kukhanya Civil Engineering Contractors vs Abacus Construction Costs Consultants (pty) Ltd (66/2019) [2022] SZSC 20 (09 June 2022), Where a patent error of law or mistake of law was raised as a ground for review in that court cited the learned Authors in Hebstein and Van Winsen 'The Civil Practice of The High Courts in South Africa 5th ed. Vol 2 at page 1273;

"A bona fide mistake of law usually gives grounds for appeal only, not for review where, therefore, a Magistrate refuses to allow an amendment or strike out an allegedly defective portion of a plea, the matter cannot be taken on review. The same applies to an incorrect decision as to the party on whom the onus of proof lies. The consequences of a mistake of law will, however, amount to a gross irregularity if a Judicial Officer, through a mistake of law, does not direct his mind to the issue before him and so prevents the aggrieved party from having his case fully and fairly determined. In that event the proceedings are reviewable. A mistake of law is reviewable also if it prevents the exercise of the discretionary powers entrusted to the body or person making the mistake".

[41] This court should embark on an enquiry to determine whether the ICA appreciated its discretion in interpreting section 19(1) or it misread the Act and wrongly interpreted it. The court is empowered to correct the ICA where it finds that it interpreted the Act wrongly and to declare if necessary that the ICA ought to have directed its mind to the true question for the decision.

[42] The first ground for review is premised on the proper interpretation of section 19 (1) of the IRA ('the Act").

[43] Section 19(1) of the IRA regulates appealibility to the ICA. The ICA in the impugned judgement noted that by way of amendment the subsection read:
"19.(1) There shall be a right of appeal against the decision of the court on a question of law to the Industrial Court of Appeal."
After the amendment, which was in the form of an insertion, underlined below it reads.
"19 (1) The shall be a right of appeal against a decision of the Industrial Court, or an arbitrator appointed by the President of the Industrial Court under section 8 (8) on a question of law to the Industrial court of Appeal."

The court proceeded:

[44] "[22] In other words, by the legislature inserting a comma immediately after the word court' it intended not only to introduce arbitration decisions as appealable but also to repeal the circumscription that existed in the old section 19(1). The legislature therefore, enacted that decisions of the Industrial Court shall be appealable without limiting their appealability to the question of law only. The amendment introduced appealability on the question of fact also in so far as decisions of the court below were concerned. It is only decisions of the arbitration that were now circumscribed."

[45] Hon Van de Walt JA in the Vilakati case (*supra)* concluded that 'the pronouncement is that only arbitral decisions henceforth were confined to questions of law interms of the amendment, and that the previous limitation on appeals against the *curial* decisions i.e decisions, by the Industrial Court impliedly had been repealed by the amendment'.

[46] The ICA in the impunged judgement premised its finding for the extended jurisdiction on its interpretation of the amendment to section 19 (1) and the insertion of Section 19 (6) by virtue of the amendment.

[47] The ICAin the impugned judgment when relating to the amendment of section 19(1) of the Act and the insertion of 19(6) by the amendment, held that the comma after phrase *'There shall be a right of appeal against a decision of the Industrial Court...* in the amendment to section 19 (1) was intended to distinguish between an appeal against the decision of the IC and an appeal against the decision of an arbitrator appointed by the President of the IC'.

[48] The earlier cases in which section 19 (1) as amended was considered held as follows; the first is Swaziland Electricity Board v Clollie Dlamini (*Supra*). Judgement delivered on the 27th February 2008 the ICA ruled (at paragraph 11);

"The appellant has no right to appeal to this court on a question of fact".

The Second, is Elias Velaphi Dlamini vs Ministry of Justice and Constitutional Affairs and Others (*supra*) ruled;

"It is plain from the peremptory provisions of this section that an appeal from the Industrial Court to this court is circumscribed. It makes perfect sense therefore that the industrial Court of Appeal should be confined to points of law only."

The third, is the passage above in Elias Velaphi Dlamni (Ibid) was quoted in the matter of theChairman Civil Service Commission vs Issac Dlamini (*supra*).

[49] The ICA in two subsequent judgement since 2021, the case of Trevor Shongwe (*supra*) and Vilakati (*supra*) have both concluded that all appeals to the ICA are confined to questions law. Both decisions pronounced that the

ICA's impugned decision could not be supported. *(see* paragraph 26 of the Vilakati judgement

Relevant canon of Statutory Interpretation.

[50] Regard being had to the current canons of interpretation of statutory and other legal instruments as expounded in two recent case in Eswatini, The case of Atlanta Products (pty) Ltd vs Swazi Cables and Lightning (pty) Limited t/a Auto Tecla Solutions (1/2022) [2023] SZSC 07 (06 March 2023 at paragraph 17) and Swaziland Lottery Trust (pty) Ltd v Swaziland Revenue Authority (CIVI 65/2021) [2022] SZSC 11 (13 May 2022). The Supreme court endorsed the approach to the interpretation of statutes (and other instruments) commenced by the SA Supreme Court of Appeal in Natal Joint Municipal Pension Fund v Endumeni Municipality [2012] ZASCA 13; 2012 (4) SA 593 (SCA,at para [18].

"[18] ... The present state of law can be expressed as follows. Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. 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 businesslike for words actually used. To do so in regard to a stature 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 that the one they infact 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".

[51] The general applicable principles of interpretation as summarized by Justice Van de Valt in the Vilakati judgement at paragraph [16] 'is that not only the language employed by the legislative should be taken into account, the proper approach would be to also look at the context, the circumstances under which the provision came into being and all surrounding facts. It is an objective process and a sensible meaning to be preferred to one that leads to insensible or unbusinesslike results, or undermines the apparent purpose of the statute.'

Compelling reasons why the ICA's Interpretation in this matter should not be followed.

[52] First, the ICA in the matter of Trevor Shongwe (*supra)* held that the jurisdiction of the ICA is expressly restricted to questions of law by section 19 (1) of the IRA, such is a peremptory statutory provision. This is a position that has constantly been held and established in a number of the ICA decisions cited above in this judgement.

[53] Second, the ICA in the impugned judgement made no reference to established canons of statutory interpretation as expounded for in Natal Joint Municipal Pension Fund case (*supra*). Had it adopted the well known canons of constructions and read the provisions in context and regard being had to the purpose of the provision and its background to the preparation and production

of the amendment, it would have seen that the amendment sought to correct an incorrect legal position concerning "compulsory" arbitrator as initiated by the President of the IC, in accordance with section 85 (2) read together with section 8 (b) of the Act, as opposed to the '*voluntary*' arbitrator under the auspices of CMAC. Previously there was no right of appeal in respect of compulsory arbitrators. I have no reason with respect to depart from this approach of construction. The impugned judgment does not contain any reference to any case law or authority concerning the interpretation of statute it adopted.

[54] Third, the interpretation offered by the court in the impugned judgment of the ICA did not enjoy the support of either counsel in the Vilakati judgement when it was argued. Mr Jele counsel for the employer after venturing into what was described as a proper and purposive construction of section 19 (1) submitted that, '*the interpretetation afforded in the Swaziland Building Society therefore should not be accepted'*. On the other hand Mr Dlamini on behalf of the Employee stated that *he was unable in law, to support the Swaziland Building Society Judgement.* The ICA in Vilakati after a scrutiny of the applicable legal principles concluded that the judgement in Swaziland Buildng Society was wrong and should not be followed.

[55] Forth, the court in in its exposition of section 19(1) in the Vilakati judgement took into account sections 20(1) and 21(1) which the court in the impugned judgement did not consider whilst the sub-sections deal with appeals from the IC and were not amended. These sub-section fall under respective headings of 'Section 20 **'Establishment and composition of the Industrial court of Appeal"** and **"21. Jurisdiction of the Industrial Court of Appeal'**. The court in that judgement pointed out that these sub-sections do not allow for jurisdiction over arbitral appeals.

[55] Fifth, The court in the Vilakati judgment enunciated that the proper approach in the interpretation requires not only the language (as emphasized by the ICA in the impugned decision) but 'to also look at the context, the circumstances under which the provisions came into being and all the surrounding facts. That it is an objective process and a sensible meaning to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the statute.'

[57] Sixth, 'the implied repeal of a statutory provisions not lightly concluded and it must be found that such repeal was made either expressly or by necessary implication. Repeal by implication however, not favored'. The ICA in the impugned judgement suggested an implied repeal of section 19(1) from the previous position to the new without venturing reasons or justification warranting why the legislature would depart radically from appeals on law to also include facts without express provision. *See* Minister of Justice and constitutional Development and others v Sourthen African Litigation Centre and Others 2016 (3) SA 317 (SCA) (4) BCLR 487:-

"118 [B]ut repeal by implication is not favoured. An interpretation of apparently conflicting statutory provisions which involves the implied repeal of the earlier by the later ought not be adopted unless it is inevitable. See also Wendywood Development (Pty) ltd v Reigar and Another 1971 (3) SA 28 (A) at 38 A-B.

" Repeal by implication is not favoured. An interpretation of apparently conflicting statutory provisions which involves the implied repeal of the earlier by the later ought not be adopted unless it is inevitable... Any reasonable construction which offers an escape from that is more likely to be in consonance with the real intention of the legislature."

[58] Seventh, no sanctity attaches to punctuation. The ICA in the impugned judgment when interpreting section 19 (1) said when appropriate regard is had to the comma that appeared in the amended section 19 (1). Based on the foregoing, it said (at paragraph [25]: "By the use of a comma, a litigant may appeal on both question of fact and law". The court in the Vilakati Judgement cited with approval the South African Court of Appeal as previously known) the case of Government of Labowa v Government of The Regpublic of South Africa and Another 1988 (1) SA 244 AT 359 D-E. it stated;

"Mr Gordon quoted no authority for the proposition that words in parenthesis were to be differently interpreted depending on whether the parenthesis was indicated by brackets rather than by commas or semi-colons. The lack of authority for this proposition is not surprising since punctuation is a matter to which little or no regard in has in the interpretation of statutes... ' Steyn Uiteg Van Wette 5TH ED AT 150(quoted in that judgement observed) *"I need not come to any firm conclusion on the matter since it is clear that no sanctity attaches to punctuation-indeed, an interpretation supported only by the use of a particular punctuation mark must inevitably yield to one based on the intention of the legislature as it appears from the meaning of the words used read in the context."*

[59] The court in Vilakati continued to observe that the ICA in the impugned judgement appeared to have attached overdue weight to punctuation and in sufficient weight to context and purpose of the Act or the provisions of sections 20(1) and 21 (1) of the Act. 'The relevant conclusion the court in the Swaziland Building Society case or reconsideration of all the issues cannot be supported. The mere placement of a comma cannot and did not legislate, the jurisdiction of the court out of existence.'

[60] Eighth, presumption against outing of jurisdiction. The ICA in the impugned judgment held that the amendment in section 19(1) repealed the position that *curial* appeals are confined to question of law only, the repealed position gave a litigant dissatisfied by the decision of the IC to then appeal on both law and fact. The ICA in the Vilakati judgement applying the general principle of presumption against ousting of jurisdiction of a court as enunciated in Minister of Law and order V Hurly and Another 1986 (3) SA 568 (A) at 584 A-B per Rabie CJ:

"It is a well-recognized rule in the interpretation of statute, it has been stated by this court," that the curtailment of the powers of a court of law, is, in the absence of an express or clear implications to the contrary not presumed" and Rex vs Padsha 1923 AD 281 AT 304)."The court will, therefore , closely examine any provision which appease to curtail or oust the jurisdiction of courts of law".

[61] The Vilakati judgement held in this respect that "the presumption ousting jurisdiction holds against the conclusion of the ICA in the impugned judgement to the effect that the amendment served to obliterate recourse to the ICA in *curial* appeals, more so since sections 20(1) and 20 (1) have been left intact and cannot be considered to have been erased legislatively by virture of implied repeal or otherwise'.

[62] I am inclined with respect to hold that the analysis and findings of Vilakati Judgment authored by the Justice of Appeal Van der Walt regarding the proper construction of section 19 (1) of the IRA is the correct one *vis a vis* the reasoning in the impugned ICA judgement.

[63] The court in the Vilakati judgement ought to be accepted by this court as the correct exposition of the law with the result that the findings, to the contrary by the ICA in the impugned Judgement is not to be followed. I further agree

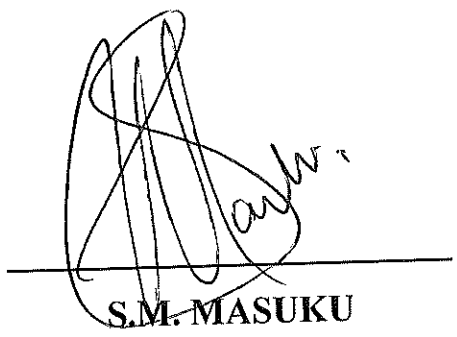
with respect that the impugned judgement was wrong and allows this court to review it and set it aside.

[64] I hold further that the ICA's erroneous finding in the impugned judgement on its jurisdiction and its decision to consider and decide the appeal on facts and law are reasons enough to set aside its decision that dismissed the IC order. It is unnecessary for this court to consider the further grounds of review as set-out by the Applicant.

[65] In the premises the ICA's decision on the appeal was unlawful and falls to be reviewed and set-aside.

Operative orders

1. The judgement of the Industrial Court of Appeal handed down on the 24th October 2018 is reviewed, corrected and set aside.
2. The Industrial court of Appeal order is substituted with an order dismissing the appeal that came from the Industrial Court.
3. Costs are granted against the 1st Respondent including certified costs of counsel.



S.M. MASUKU

JUDGE - OF THE HIGH COURT

For the Applicant: **Advocate V.Soni SC instructed by Mkhabela Attorneys.**

For the1st Respondent: **Advocate ARG Mundel SC instructed by S.V Mdladla & Associates.**