IN THE INDUSTRIAL COURT OF APPEAL OF ESWATINI

JUDGMENT

CASE NO. 05/2019

In the matter between:

SIYABONGA MAGUDVULELA DLAMINI **APPLICANT**

And

ESWATINI ELECTRICITY COMPANY **RESPONDENT**

Neutral Citation: *Siyabonga Magudvulela Dlamini vs Eswatini Electricity Company (05/2019)[2019]* SZICA 16 (16 October 2019).

Coram: C. MAPHANGA AJA, T.M. MLANGENI AJA, D. TSHABALALA AJA

Heard: 2/10/19

Delivered: 16/10/19

Summary: *Labour Law- Application for Condonation and leave to file an out of time Appeal against a portion judgment of the Industrial Court on account of a patent error; Contemplated appeal arising in respect of an order made pursuant to a declaration of certain conduct of the Respondent in unilaterally placing of the Applicant on unpaid leave as constituting unfair labour practice; Court in effect finding the respondent liable to compensate the applicant for the duration of the period covering the said constructive leave between time of special appointment of the Applicant to the Senate to date of voluntary exit in terms of voluntary retirement agreement; Period co-extensive with applicants tenure of employment with the respondent; Despite finding*

for the applicant on the merits court a quo awarding limited quantum in compensation for a period of four months covering actual period when the applicant actively reported and presented himself for service;

Held applicants application for leave holding good prospects of success in principle; Held that Industrial Court of Appeal lacks power to grant condonation upon proper interpretation of the peremptory provisions of section 19 of the Industrial Relations Act of 2000; Held statutory provisions prevail and take precedence over the permissive conflicting provisions of Rules 8 and 9 of the Industrial Court of Appeal Rules, 1997; Application dismissed with no order as to Costs.

JUDGMENT

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[1] During the month of July 2016 the applicant brought an application before the court a quo for relief against the respondent (his erstwhile employer) the Eswatini Electricity Company wherein the applicant sought a declaratory order determining a decision by the respondent to impose an unsolicited unpaid leave, an act of unfair labour practice. In conjunction with the declaratory he also prayed for a remedial order for compensation for a period covering the duration of the said period of unpaid leave comprising the withheld arrear salary pursuant to the imposed leave. It was common cause that the term in contention was for the period covering the months January 2009 to March 2010 and the aggregate remuneration claimed was a sum of E266, 670.00. The applicant had also sought an award of costs for the application.

[2] It is common cause that the applicant was in the service of the Respondent holding the position of Training Officer, his tenure being between the 1st February 1984 until 31st March 2010 when he concluded a voluntary retirement agreement with the respondent, effective on the latter date.

[3] The background facts leading to the dispute between the parties can be summarised as follows. During October 2008, the applicant received notice of a formal appointment from the Office of His Majesty the King conferring and appointing him to serve as a member of the Senate in the 9th Parliament of the Kingdom; which appointment was to take effect at

the resumption of the parliamentary tour of duty in January 2009. Pursuant to the appointment the applicant was sworn into office and assumed his duties at the start of the Parliamentary season.

[4] The pertinent developments in the wake of his assumption of Senatorial duties are that shortly upon his appointment and around the 28th October 2008 the respondent caused to be delivered notice by way of a letter bearing the said date advising him of its decision to 'release' him on unpaid leave of absence for the duration of his appointment to the Senate effective 1st January 2009. Significantly it was not lost to the trial court that the respondent's notice to the applicant added an instruction to the applicant to liaise with the then General Manager (Corporate Services) and his supervisor to facilitate the 'handing over' of the functions of his office. It is common cause that pursuant to this notice the respondent suspended the applicant's salary with effect from January 2009; which suspension was to endure until the effective retirement date in line with the voluntary exit agreement.

[5] It is further common ground that at all times material to the dispute the applicant was aggrieved by the respondent's unilateral imposition of the unsolicited leave of absence and vigorously pursued his grievance and claim for payment of the withheld salary with the respondent but the dispute could not be resolved with the result that by the time of the negotiation of the voluntary exit terms the issue and attendant claim for payment remained extant and live.

[6] In due course the applicant brought the application for the declarator and payment of the compensation before the court a quo whereupon preliminary proceedings the court a quo directed the leading of oral evidence in order to investigate and explore the circumstances surrounding the decision by the respondent to place the applicant on unpaid leave. After the hearing oral evidence the court proceeded to receive the parties' submissions and at the conclusion of the proceedings it effectively found for the applicant on the question of liability and as mentioned above, determined that the respondent's actions and the treatment of the applicant complained of, were an unlawful breach of contract, discriminatory and constituted unfair labour practice. It is instructive that in the judgment the learned judge a quo carefully enumerated the basis for its reasoning as follows:

a) that the applicant had not been consulted prior to his salary being stopped;

b) the respondent relied on a policy that was not yet operational as there was no evidence that it had been approved and adopted at the time as justification and legal basis for the suspension of the salary;

c) the respondent's conduct was discriminatory as it did not treat the appointment of a former employee in similar circumstances in like manner.[1]

[7] That formed the core ratio for the courts finding on the matter of liability and the underlying causa; a finding that the respondent's conduct constituted an unfair labour practice.

[8] It must be noted that at the heart of the dispute was the alleged breach of contract and unfair dealing by the respondent flowing from the singular act of placing the applicant on unpaid leave and releasing him from active duty. That appears as the central premise to the court's decision and the principal basis for its judgment. In the award of compensation however the court a quo substantially rejected the quantum of the applicant's claim and instead ordered compensation only for a period of 4 out of a total of 14 months claimed by the applicant. Having sketched the background facts I now turn my attention to the present application.

THIS APPLICATION

[9] The judgment of the court a quo was rendered on the 24th October 2018 in open court. It is not in dispute that the applicant only had opportunity to consider the reasoned written judgment upon receiving it the day after, on the 25th October. At that time he was represented by his erstwhile attorney, the learned Mr Sikhumbuzo Simelane of the firm Simelane Mntshali Attorneys. It is common cause that they soon parted ways thereafter. He is presently represented by his new attorneys of record Messrs MLK Ndlangamandla Attorneys who have filed the present application on his behalf.

[10] The application was filed by the applicant on the 3rd April 2019, after the lapse of a period of at least six months after the judgment of the court a quo. It is opposed by the respondents who have raised certain preliminary points of law in light of threshold issues that it considers foremost, threshold issues which if upheld they contend should be dispositive of this application without the need to venture into the merits.

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[1] Vid. paragraph 48 of the judgment.

That said it is common that in interlocutory application of this kind the procedural issues that emerge do not lend themselves to a neat distinction between preliminary and principal issues – ultimately the issues that are decisive are:

a) whether the application is founded on an established procedural remedy that is competent in law; and consequently

b) whether the applicant has made out a proper cause in the sense of fulfilling the requisite conditions precedent in terms of the procedural requirements in regard to the relief sought.

[11] The underlying core objective of the application is that the applicant intends to challenge a portion of the judgment of the court a quo in so far as he asserts that he was aggrieved by the award of compensation by the court a quo to the measure of four months arrear salary although he accepted and was satisfied by the courts decision and finding in his favour on the merits. His disquiet arises out of his contention which is the gravamen of the contemplated challenge on appeal to the judgment, that the court a quo made an error in its award and that this was a fundamental and patent error, manifest in the face of the judgment in so far as the award is inconsistent and remarkably at variance with the courts express findings to the contrary on the merits and issue of liability.

[12] In this judgment I intend to deal with and consider these aspects more closely in the context of examining the parties' submissions presented on the prospects of success of the contemplated appeal. Before venturing thus far it is necessary and logical to deal first with the points in limine that have been advanced by respondent.

IN LIMINE

[13] The respondent opposes the application both in substance and on procedural grounds and it has filed an answering affidavit raising the objections and canvassing the factual basis for the application.

[14] Foremost the respondent raises two legal points in limine on the basis of which it seeks the dismissal of the application. These are set out as follows:

1. That this court lacks the jurisdiction to condone the late filing of an appeal outside the prescribed time limits set in the provisions of section 19(3) of the Industrial Relations Act; which provisions

respondent contends preclude the courts' power to entertain such applications;

2. That the applicant's conduct after the judgment and award a quo amounted to acquiescence and or acceptance of that judgment consequently on the principle of pre-emption the applicant is precluded from appealing the said judgment.

Jurisdiction

[15] In addition to the affidavits filed of record by the parties, it merits mention that at the inception of the hearing when the matter first came before us on the 23rd September, 2019, Mr Sibandze who appeared on behalf of the respondents sought to disclose and draw the attention of the court to the existence of an affidavit deposed to and filed by the applicant's erstwhile attorney, Mr Sikhumbuzo Simelane. On account of the fact that the said affidavit had been filed out of turn and without proper leave by the said learned former attorney of the applicant it became necessary by consent to postpone the hearing to enable the proper placement of the affidavit before the court and to enable the parties and the court to have due regard to the content deposed to therein.

[16] Mr Sibandze impressed upon us that the affidavit in question was of keen interest to the proceedings at hand on account of the issues pertaining to the background and the proper assessment by the court of circumstances concerning the lapse in the lodging of an appeal tendered in the applicants founding affidavit; which by and large attributed the lapse to the alleged inaction or neglect by his former attorney in the due and timeous prosecution of the applicant's alleged instructions to lodge an appeal against the award for compensation by the court a quo. That affidavit was in due course properly filed upon leave being granted and the matter placed for the hearing of final argument on the 2nd October, 2019.

[17] The applicant's case is that, although no dates are indicated in the founding affidavit, he deposes that shortly after receiving and considering the judgment he instructed Attorney Simelane to immediately note an appeal; which instructions were readily acceded to by the said attorney. It is unclear what the applicant means by use of the term acceded to but it may be assumed in the context of the deposed facts that he seeks to convey that his former attorney accepted and acknowledged these instructions, undertaking to take up the matter.

[18] Applicant further avers that despite demanding and receiving a deposit to secure his fees for the purpose, and in spite of several earnest reminders and enquiries, he was to discover that his former attorney had failed or neglected to abide by the instructions and the undertakings to lodge the appeal. Applicant further avers that it was not until the engagement of his current attorneys after being avoided and sent on a wild goose chase by his erstwhile attorney that in fact no such appeal had been lodged as of record. This was in March 2019 after the dies for the lodging of an appeal had lapsed. He states it was at that point in time when his former attorney admitted that in fact the appeal had not been filed.

[19] That, by way of background, are the circumstances under which in exercise of the courts discretion Mr Simelane's affidavit was permitted into the record to enable him to respond to the allegations on record and to illuminate the circumstances pertaining to the alleged instructions and his conduct in the matter. I now revert to the preliminary points of law taken in their turn.

The Statutory Provisions and Rules

[20] The relevant section relied upon by the respondent in objection to the application for condonation is section 19 (3) of the Industrial Relations Act No.1 of 2000 (as amended) ('the Act') which sets out the prescribed time limits for an appeal before this court as follows:

> **"(3) An appeal against the decision of the Court to the Industrial Court of Appeal shall be lodged within three (3) months of the date of the decision"**

[21] It is self-evident upon a reading of this provision and its application to the matter at hand that the dies for the filing of an appeal as contemplated by the applicant expired on the 24th January 2019. Accordingly any intended appeal against any aspect of the court a quo's judgment fell out of time after that date. As indicated this very application for condonation and the draft notice of appeal was only filed on the 3rd of April 2019. By the applicant's account he had given his current attorneys the instructions to file this application around March 2019. Even on this date it would still have been outside of the prescribed time limits.

[22] The crisp question raised by the respondents *in limine* is whether this court in light of the above section in the Act, has the power to condone the late

filing of the proposed appeal. It bears noting, for the sake of completeness, that in contradistinction the Industrial Court of Appeal Rules (promulgated under section 20 of the Act of 1996) seek to regulate the conduct by this court of applications for condonation for late filing of appeals in such terms as to appear to 'confer' the power to entertain applications for condonation and leave for late appeals. To this extent the rules are in obvious conflict with the Act. The relevant problematic provision in the rules read as follows:

> *"Time for Filing Notice of Appeal*
>
> *8. (1) The Notice of Appeal shall be filed within seven days of the date of the judgment appealed against.*
>
> *Provided that if there is a written judgment such period shall run from the date of delivery of such written judgment."*

Rule 9 (1) seeks to regulate the filing of applications for leave to appeal in the following terms:

> *Application for leave to appeal*
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> *9. (1) An application for leave to appeal out of time shall be filed within six weeks of the date of the judgment which it is sought to appeal against and shall be made on notice of motion to the Industrial Court of Appeal stating shortly the reason upon which the application is based, and where facts are alleged they shall be verified by affidavit."*

Finally rule 17 provides as follows:

> *Condonation*
>
> *17. The Industrial Court of Appeal or any Judge thereof may, on application and for sufficient cause shown, excuse any party from compliance with any of these Rules and may give such directions in matters of practice and procedure as it considers just and expedient.*

Rule 17 strikes me as the sort of general discretionary power that should be located in the principal legislation.

[23] To confound the position further Rule 9 of the said rules sets out that an application for leave to appeal out of time *'shall be filed within six weeks of the date of the judgment which it is sought to appeal against..."*

[24] The wording used in the rules also adds to the confusion in that it conflates the concept of applications for leave to appeal which ordinarily can only arise in circumstances where the right of appeal does not otherwise avail a party or litigant thus necessitating the grant of leave of court on the one hand. On the other hand are applications for condonation for the late noting of an appeal where such a right of appeal ordinarily avails the affected party.

[25] The most pressing anomaly presented by the rules when read against the clear and unambiguous wording of the Act is the obvious conflict between the provision of the rules and those in the principal legislation for the noting of an appeal against a judgment of the Industrial Court.

[26] This court has had to ponder the conundrum presented by these conflicting provisions between the enabling act and the rules. The most definitive judgment and precedent on the matter was in the decision of this Court in *Arthur Mndawe and 74 Others v Central Bank of Swaziland* SZICA Case No. 08/2008 (*the Mndawe case)* where the court held that on a proper interpretation of the terms of section 19 of the Act this court does not have the jurisdiction either expressly of by necessary implication, to grant condonation for the late filing of an appeal outside of the prescribed time limits for noting of an appeal stipulated in the section. In Mndawe the court gave a thorough and comprehensive review of the statutory provisions as well as a comparative analysis of the relative rules of this court and in light of the misalignment and conflict with the Act, the learned Justices came to the considered opinion firstly that the provisions of the Act are peremptory and prevail over the rules in the sense of the provisions of the Act having legal precedence over the rules; the latter being subsidiary and derivative to the statutory provision in the enabling provision for promulgation of rules for the conduct of appeals.

[27] Secondly in Mndawe the court decried the misalignment and the undue hardship or constraints caused by the preclusion of the courts discretion to grant condonation even in meritorious and deserving circumstances; the adverse scenario posed by the present framework under the section.

There is thus no doubt that the court has made a definitive and settled pronouncement of the effect of section 19(3).

[28] We were then referred by the applicants attorney, the learned Mr Ndlangamandla, to the cases of ***Swaziland Beverages v Christoffel R. Delport*** **(05/2012) [2013] SAICA 05** and ***Swaziland Revenue Authority and 3 Others v Presiding Judges of the Industrial Court of Appeal and 2 Others*** (1742/2017) [2018] SZHC (209) in support for the proposition that the Industrial Court of Appeal has recognised and retained a discretion comparable to the jurisdiction of the Supreme Court's inherent prerogative to grant condonation. With respect, we are unable to accept the merit of this argument and find no basis or substance for the alleged authoritative support that Mr Ndlangamandla advances. A careful reading of the judgments relied on will reveal that no such authority for the proposition so advanced may be derived from those decisions of this court and the Supreme Court, respectively. On the contrary in the Breweries case this Court reiterated and reaffirmed its stance in Mndawe that section 19(3) of the act is decisive and peremptory admitting to no exception to the rule that being a creature of statute this court has no inherent power (akin to the Supreme Court) to grant condonation for appeals out of time in the absence of express provisions to this effect in the principal legislation. The court however found on the facts that upon the consideration of the time lines and calculation of the dies in that case taking into account court days the notice of appeal was substantially within the time frame (given that it was at the brink of the time limits of the 3 month period by only one day only). Further as regards the comparative status and powers of the Industrial Court of Appeal in relation to that of the Supreme Court, it may be noted that the SRA case relied on by the learned attorney for the applicant has been reversed by the Supreme Court decision that came in its wake on appeal. The binding effect of the Supreme Court judgment in the SRA case is that the Industrial Court of Appeal being a creature of statute has no inherent common law powers in the same manner as the High and Supreme Court of the Kingdom. Its powers are derivative from statute which serves as a source and delimiting basis for its power.

[29] In sum I have no hesitation in light of the decided cases; albeit subject to the reservation expressed by this court on the perverse effect of section 19 (3) in the Mndawe case, that the provisions of the section are decisive and that the point of law taken that it is not competent for this court to grant the relief of condonation and leave to appeal in the present circumstances must take hold.

Peremption

[30] The respondent submits that in the aftermath of the court *a quo's* judgment in his favour, the applicant had been vigilant in perusing and executing the same and in the course of that process accepted payment without so much as demur in October 2018. Respondent contends further that in the light of this conduct the applicant must be taken to have accepted and acquiesced to the judgment and thus must be precluded from challenging it. To this end respondent advances and relies on the doctrine of pre-emption as grounds for dismissing the application outright on the basis that the applicant's conduct is inconsistent with an intention to appeal the judgment. Respondent relies on a slew of judicial opinion tendered to buttress this point.

[31] For his part the Applicant has deposed as to his attitude and state of mind at the material time upon the delivery by the court a quo of the judgment that although he felt vindicated and satisfied with the substance of the judgment on the merits and central cause for the sought relief on liability, he had serious reservations about the order as to the quantum of compensation granted by the court and that he had expressed his disquiet and dissatisfaction with this aspect to his then attorney. To the cynical bystander this might bear the hallmarks of a self-serving statement after the event to explain the reasons for the lapse in timeously lodging an appeal, but on the balance I have no reason to doubt that what he says was most probably his attitude as much as I do not regard this to be an improbable state of affairs given the circumstances of the matter and the jarring effect in the judgment that I shall turn to shortly. It seems also more probable than not that indeed he duly instructed his former attorney to challenge the anomaly or source of complaint in the said judgment; namely the order handed down by the court in the outcome.

[32] Applicant's version is given credibility by Mr Simelane's own version in his affidavit where in no uncertain terms he acknowledges that during November 2018 (well within the time limits for noting an appeal) the applicant had given him instructions to contest the award aspect or order in the judgment in light of the perceived error; Simelane also admits and concedes that he received the applicant's deposit of a sum of E10, 000 as comfort and cover for professional fees to that end.[2] The learned attorney gives further account outlining his reasons premised on his own professional judgment at the time the effect of which he states that he did not fancy the applicant's prospects of success. The learned attorney

[2] See paragraph 11.2 of Attorneys Simelane's affidavit)

further advances the technical reasons why he did not advance the matter and act in accordance with his client's instructions. What is remarkable however is that according to Mr Simelane it was not until December that he changed his mind and decided to reject the Applicants instructions by informing him that he was declining the brief as he was minded of a potential conflict on account of the prospects of a retainer with the Eswatini Electricity Company. Curiously even then his former attorney did not tender to return the deposit of fees.

[33] On these facts I am disinclined to make an adverse finding against the applicant or to find merit in the respondent's argument that the applicant acquiesced to or accepted the judgment of the court a quo *en toto* without demur. On the other hand I am persuaded on a balance of likelihoods that at all material times, he was minded to seek some redress in light of his dissatisfaction with the remedial order as to the award of the compensation following the result of the substance of the judgment.

[34] The duty to investigate and properly evaluate the appropriate form of redress to address the anomaly and source of grievance in the impugned judgment fell on his attorney as did the obligation to advise him on the most preferable, time efficient and cost effective legal course. I am not certain that his then attorney gave the matter his utmost consideration but I make no judgment in that regard. It may well be that the rigour and fatigue of litigation in the matter had taken its toll on him. For this reason I cannot find fault for his professional judgment as to the perception on prospects of success that he formed in mind. That is a call he made subjectively and most probably in good faith at the time as he is wont to explain. It is perhaps most apposite nay convenient that I turn to the question of the prospects of success.

Prospects of Success

[35] At the core of the applicant's complaint against the judgment is not its correctness as to the merits as it is clear from his account that on the face of the judgment the court found for him in the substance and principal basis for his claim. His grievance is what he terms the apparent error ex facie the judgment as relates to the final outcome in the ancillary order made for compensation and the reasons therefor.

[36] In his founding affidavit the applicant articulates his complaint as follows:

> *"14 .....(I) gave clear instructions to my attorney immediately after the delivery of the judgment which*

was read in full court when delivered, to immediately note and appeal as I felt the court had committed an error in the main order it made"

[37] Further the applicant elaborates at paragraph 15 of the affidavit by adding that:

> *"15. If the late filing of the notice of appeal is condoned, there are good prospects of success in it. The court itself states that I was an employee until I entered into the voluntary retirement agreement with the respondent, in short that means I was an employee for the fifteen months which I claim salary arrears for. It means I was entitled to receive my salary on the basis that the employment relationship had not been severed.*
>
> *15.1 The court itself states in its judgement that I could not render services because of the conduct of the respondent in that I was deprived of working tools and I was denied access into my office, otherwise I was reporting for duty. The court states that he respondent cannot go on to benefit from its own act of unlawfulness. However the court goes on to award the respondent the benefit of not paying me for eleven months.*
>
> *15.2 The Court in its judgment cites some authorities with approval that state that if it was not my fault not to render services then I have to be paid for the whole duration when I was prevented from rendering services"*

[38] From this one is left in no doubt as to the applicant's account of what aggrieves him and what he regards as an error on the face of the judgment. Indeed in the above quoted averments he has lucidly demonstrated the aspect in the judgment that in his view is at variance with the substance and reasoning in the rest of the judgment. This he does by alluding to the pertinent aspects of the courts findings on the merits.

[39] In considering the judgment we note with respect, that it is a well-reasoned and impeccable decision reached upon a careful analysis of the principles of law and their application on the facts as well as the court's findings on the evidence led. On that basis the court then goes on to make conclusions determining the questions and issues on liability of the

respondent for the applicant's claims. Having found that the respondent had unilaterally (i.e. without consultation or solicitation) placed the applicant on unpaid leave for the duration of his tenure in Parliament in effect the court also found that the respondent had unlawfully and wrongfully suspended or withheld the applicant's remuneration. The courts trenchant findings follow at paragraphs 38 to 39 of the judgment thus:

> *'38. **The argument by the Respondent is not supported by the evidence before the Court. The evidence before the Court revealed that on the 28th October 2008 after the Respondent learnt of the Applicant's appointment, it wrote a letter to him telling him that he would be released on unpaid leave of absence for the duration of his appointment to Parliament with effect from 1st January 2009. It was therefore, the Respondent that first committed a breach of the terms of employment relationship between the parties by stopping the salary of the Applicant unilaterally, without consultation.***
>
> *39. **By stopping the Applicant's salary without prior consultation, the respondent created an environment in which it would be impossible for the Applicant to fulfil his contractual duties to the employer. The employer cannot be allowed to benefit from its own unlawful conduct. Dealing with a similar question the Court in the case of Raymond Mhlanga v Swaziland Government & Another, case No. 161/09 (IC) stated as follows in paragraph 15 that:***
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> > *"**When the Applicant was not at work he did not render any services to the Respondent. It would therefore be unfair to order the 1st Respondent to pay the Applicant any money for the period that he did not render any services. However, if the Applicant was unable to render his service because of the conduct of the 1st Respondent (employer), it would also be unfair that he is not paid his arrear salary for the period that** he was not at work because of the conduct of the 1st Respondent"*

Similarly, in casu, the Respondent cannot successfully argue that it is not obliged to pay the Applicant his arrear salary because he was not reporting for duty. The applicant did not report for duty because of the Respondent's unlawful conduct of unilaterally stopping his salary.

[40] It is clear from the court's reasoning that it came to the conclusion that in effect the applicant was presented with a *fait accompli* by his employer, having been taken off the payroll and placed on unpaid leave for the duration of his parliamentary tour of duty. Elsewhere in the judgment again the court leaves one in no doubt as to its conclusion on this question when it found that not only had the respondent simply placed the applicant on compulsory leave, it had effectively physically prevented him from rendering his services on the evidence placed before court. In paragraph 45 the court puts paid to any doubt as to its reasoning when again it concluded...'**From the evidence before court, it was clear that the Applicant did not render his services to the Respondent because of the unlawful conduct by the respondent. The Respondent stopped the Applicant's salary without prior consultation. It was the Respondent that breached the terms and conditions of employment.....**"

[41] In my respectful view the Court *a quo* should have ended the enquiry there and made an appropriate order compatible with the clear substantive reasoning of the court thus far. Consistent with the learned judge's findings and determination of the matter on the merits, at paragraph 48 the court comes to the conclusion as follows:

> *"48. **There is no doubt to the Court that there was unfair labour practice in the manner that the applicant was treated by the Respondent because:***
>
> *48.1 **The applicant was not consulted by the respondent prior to his salary being stopped.***
>
> *48.2 **The respondent relied on a policy that was not yet operational as there was no evidence that it had been approved and adopted at that time.***

48.3 The respondent's conduct was discriminatory as it did not treat the appointment of Chief Ndzameya Nhlabatsi in a like manner"

[42] What followed this finding stands in remarkable contrast and is incongruous with the substantive judgment of the court; that is the ancillary order as to the compensation award and the rationale for the said order. The difficulties in the judgment can be readily noted from paragraph 52 of the decision when the court in an apparent *volte face* enters upon an enquiry as to the compensation quantum. It asks the question:

> *"52. The applicant having succeeded in Prayer 1, the question now is : should the Court make an order that he be paid for the whole period from January 2009 to March 2010 even when in his own evidence he told the court that he stopped reporting to work in April 2009" ((sic) my underscore).*

[44] It is my considered judgment that, having concluded that the applicant had presented himself for work from January to April 2009, and that the applicant was justified in not reporting for duty for the latter months 'because of the respondents unlawful conduct of unilaterally stopping his salary', the enquiry as to whether he was entitled to the compensation for the period January 2009 to March 2010 was a serious misdirection at variance with the court's own findings on the merits. It has a jarring effect that can scarcely be reconciled with the body of the judgment.

[45] I am further fortified in this view by the Court's own pronouncement which in my view lends the reasoning and decision of the court on the merits decisive and unequivocal. This is set in clear and unambiguous terms in paragraphs 45 and 46 of the judgment. For the avoidance of any doubt I quote the relevant excerpt of the judgment below:

> *"45. From the evidence before the Court, it was clear that the applicant did not render his services to the Respondent because of the unlawful conduct by the Respondent. The respondent stopped the applicant's salary unilaterally without any prior consultation. It was the respondent that breached the terms and conditions of employment. From 04 December 2008*

the Applicant requested to have consultation with the Respondent but the Respondent did not oblige. It was only after the Applicant had roped in the Union that a meeting was finally held at RW2's office on 17th February 2009.

"46. Once the court finds that there was no legal basis for stopping the Applicant's salary, the Court must order that the arrear salary is due and must be paid by the Respondent. That the Applicant contradicted himself on the issue whether he was reporting for duty daily or on some days in a week does not make the illegality of the Respondent's conduct any less. The Respondent placed the Applicant on unpaid leave of absence for the duration of his Parliamentary term. Fortunately for the Applicant there was a voluntary early retirement opportunity that opened in January 2010. The Applicant took up this opportunity and his application was approved by the Executive Management Committee of the Respondent on 16 March 2010. The Applicant is not claiming payment for the duration of term in Parliament, but only up to March 2010 when he retired from the Respondent's employment"

[46] The above findings by the honourable court are instructive in that they are presented in a decisive and definitive manner on substantial and crucial issues before the court a quo underpinning the applicants claim. Having so ruled there can be no doubt that the court fell into error when it purported to reopen the enquiry and make the order for a reduced measure of the claim for the withheld remuneration as it did.

[47] In *Sincephetelo Motor Vehicle Accident Fund v Gondwe* Civ Appeal No. 66 of 2010, the Supreme Court identified the sort of judicial error that may occur in a judgment which renders the meaning and or effect of a part thereof to be ambiguous or otherwise uncertain. In that case the court was faced with an error in its own judgment that made the final order irreconcilable with the sense and substance of the main judgment.

[48] The learned authors Herbsten and Van Winsen also provide further insight into the type of error or ambiguity and offer some guidance on the remedy of the correction and clarification by a court of an error arising out of an ambiguous aspect of a judgment.[3] They describe a patent error as that self-evident mistake or ambiguity on the face of a judgment which

does not reflect the intention of the judicial officer pronouncing it as expressed in the considered decision of the court on the substance or merits[4]. In my view the order given by the court for the compensation comprising 4 months arrear salary is so jarring and incompatible with the rest of the judgment so that it in effect contradicts the substance of the main judgment on the merits as regards the main relief- that is the substratum of the judgment. It is clearly a patent error manifest on the face of the judgment attributable to the court itself. It was a regrettable misdirection on the remedial element in an otherwise flawless judgment and I say this with the greatest diffidence. In the light of the above and upon proper regard to the issues overshadowed in the applicant's founding affidavit, I am left in no doubt that he was on viable grounds and in principle the applicant has shown more than ample prospects were that avenue available to him. For the reasons highlighted appeal is not a course open to him at this stage and this court is not the appropriate forum. Regrettably in the premises the absence of the appeal avenue is perverse and would inevitably result in a clear injustice where this court would not be in a position to give effect to the noble objects and prescripts in the Constitution as pertains many a litigant's expectation as to due and fair administration of justice before the Courts.

[49] In *Mndawe* this court has had occasion to highlight the shortcomings in the Industrial Relations Act in so far as the jurisdictional constraints posed by the provisions of section 19 of the Act. In obiter the court makes the following remarks:

> *'[26] There is a great need to amend Section 19 to give this Court the power to condone late filing of appeals in deserving cases where the reasons for non-compliance are legally sound, and there are reasonable prospects of success on Appeal. The appellant could have filed his Appeal late for a variety of legally sound reasons including sickness, lack of resources to engage an Attorney, the loss of the Court Record from the* Court a quo, *the disappearance and loss of cassettes in the custody of Court officials which recorded the proceedings in the Court a quo. The list is endless, and to shut the doors to condonation in deserving cases denies litigants their right to a fair hearing. This*

[4] Hebstein and Van Winsen, The Civil Practice of the High Courts of South Africa, 5 ed., at Para 12 page 934.

may particularly be the case where the aggrieved party is a dismissed worker who does not have all the resources at his disposal as does the employer.

[27] Section 21 (1) of the Constitution provides that:

> ***"In the determination of civil rights and obligations ... a person shall be given a fair and speedy public hearing within a reasonable time by an independent and impartial Court..."***

[28] Section 21 (10) of the Constitution provides that:

> ***"Any Court or other adjudicating authority prescribed by law for the determination of the existence or extent of any civil right or obligation shall be established by law and shall be independent and impartial; and where proceedings for such a determination are instituted by any person before such a Court or other adjudicating authority, the case shall be given a fair hearing within a reasonable time."***

Section 33 (1) of the Constitution provides that:

> ***"A person appearing before any administrative authority has a right to be heard and to be treated justly and fairly in accordance with the requirements imposed by the law including the requirements of fundamental justice or fairness and has a right to apply to a Court of law in respect of any decision taken against that person with which that person is aggrieved."***

Section 32 (4) (d) of the Constitution provides that:

> ***"Parliament shall enact laws to protect employees from victimization and unfair dismissal or treatment."***

[31] The Right to a Fair Hearing and the Right to Administrative Justice include not only the Right to be heard but the Right to appeal against a decision of a lower Court. The requirements of fundamental justice or fairness require that an aggrieved litigant be allowed to apply for condonation for the late filing of an appeal. It is the duty of the Court to apply what it perceives to be fundamental justice or fairness in deciding whether or not condonation should be granted; in doing so, the Court will have regard to the underlying reasons for the default as well as the existence of reasonable prospects of success on Appeal.

"Parliament shall enact laws to protect employees from victimization and unfair dismissal or treatment."

[50] The Industrial Court system of courts presents specialist adjudicative fora galvanized by the Constitution but one which is a product of legislation. The Industrial Court of Appeal is but a part of that system. It derives its power from statute. It cannot design or control its own rules in the sense that the High Court does and thus has no inherent jurisdiction. It is thus constrained to follow the dictates of the enabling statute.

It was Lord Bingham in ***R. v. Weir*** **(2001) Criminal Appeal 141 part 2 (HL)** at 147 (himself relying on ***Petch v. Gurney*** **(1994) 3 ALl ER 731** at 738) who stated the nature of such statutory limitations as follows:

> **"Where a time limit is laid down and no power is given to extend it, the ordinary rule is that the time limit must be strictly observed."**

To echo the Court's concern expressed in Mndawe, there has to be an alignment between the rules of this court and the legislation. The anomaly

is that the rules which are permissive are subsidiary- the tail as it were. For this reason it is the amendment to the Act enabling this courts discretion to consider and grant motions for condonation for late appeals that is the most pressing imperative and priority. Without it we are prevented by the said section19, of the Act from granting the sought condonation.

[51] But I must qualify these observations by saying that in light of the facts before us, the circumstances of this case and the nature of the unfortunate error occasioned by the order in the judgment a quo, I do not think that an appeal was the only or even most appropriate remedy to take in seeking to correct it or achieving just amends. If it were horses for courses then it could be said the applicant might have chosen the wrong horse for the course. Nonetheless that is the approach of choice taken by the applicant. Were this court seized with the appropriate jurisdiction and these proceedings a review for correction of an error, the applicant's fortunes would be perhaps different. Otherwise he faces a real impediment. For the reasons given earlier in this judgment his remedy may lie beyond this application or the doors of this court. Thus he reaches a dead end in this Court.

[52] In conclusion we are obliged to pronounce on the relief sought in the proceedings before us. It stands to reason therefore that having found for the respondent on the jurisdictional preliminary point of law, the present application must fail. For the reasons given earlier in the ruling on the point *in limine* on jurisdiction, the outcome of this application is the orders we make at this time hereunder.

It is accordingly ordered:-

a) the application is hereby dismissed;

b) there shall be no order as to costs.

C. MAPHANGA AJA

I concur: _____

T. M. MLANGENI AJA

I concur: _____

D. TSHABALALA AJA

Appearances:

For the Applicant: Mr. M.L. K. Ndlangamandla

For the Respondent: Mr M. Sibandze