IN THE HIGH COURT OF SWAZILAND

CIVIL CASE NO. 140/2006

In the matter between:

THEMBA DLAMINI	**PLAINTIFF**
VS	
SWAZILAND GOVERNMENT	**DEFENDANT**

CORAM	**ANNANDALE J**
FOR THE PLAINTIFF	**MR. M. MABILA**
FOR THE DEFENDANT	**MR. M. VILAKATI**

JUDGMENT

29th OCTOBER 2008

[1] The vexed question of whether it is the High Court or the Industrial Court which has jurisdiction in certain matters, and also whether such jurisdiction is exclusive, yet again comes to the fore in this matter.

[2] The issue has been the subject of various judgments in this jurisdiction, decided in the final courts of both *fora* but seemingly the penny has not yet dropped. Quite possibly though, due to the time when this matter was first instituted, some uncertainty might have prevailed, but when counsel's argument is considered it appears otherwise.

[3] Government engaged the Plaintiff as a chauffeur at the end of 2003. He claims to have had a five-year contract in terms of which he would be attached to Parliament with a stipulated annual salary. His letter of appointment states that certain documentation requires to be completed, such as a tax form, official secrets declaration, and next of kin form. The letter is dated in February 2004, referring to his acceptance a few days prior and is signed by one McFadden as Secretary of the Civil Service Board. It refers to a "P.F." number (pension fund) but the employee number is blank.

[4] It further states that the conditions applicable from the effective date of appointment are that he is appointed as

"*Chauffeur Grade A5*", *Terms of Service (probation/contract etc)* being "*temporary,*" as well as a stated basic salary and an incremental date of April. His assumption of duty is certified to have been on the 1st December 2003.

[5] The letter of appointment is devoid of the claimed five-year contractual agreement but otherwise essentially on par with the other pleaded averments.

[6] the CSB has "approved" the termination of his temporary appointment as chauffeur to the Honourable Speaker of the House of Assembly with effect from the 31st July 2004 and that he would be given one month's salary in lieu of notice.

[7] Notably, no reason for the termination of his employment is given and he is also not given even a token of appreciation for his service, or even a good wish for the future.

[8] Based on the two letters from the CSB and his assertion of a five-year contract with Government, a contentious aspect that the Defendant disavows, he issued summons to claim an amount of damages. Though not set out exactly, it seems to be the remainder of the amount that he was to have received if engaged for a full five-year period. He also

claims *mora* interest at 9% per year calculated from the 1st December 2003 until paid, plus costs of suit.

[9] I do not quite follow how the quantum of his claim is calculated, nor why the *mora* date is so stated but for present purposes it is immaterial. Equally so are a few further minor anomalies and issues to which the defendant has pleaded as being in dispute.

[10] The cause of action is pleaded to be that in breach of the agreement between the parties, the Defendant unilaterally terminated the contract between them and that it resulted in the claimed damages.

[11] The present contentious and determinative issue is that summons has been issued in the High Court and not the Industrial Court.

[12] In his particulars of claim the plaintiff states that it is the High Court that has jurisdiction in this matter by virtue of the fact that the cause of action arose wholly within the Kingdom of Swaziland. Ordinarily, that would have sufficed without any further ado.

[13] Over and above its plea to the particulars of claim, the defendant has filed a special plea. Its aim and purpose is to

dispose of the matter expeditiously, without running the gauntlet of a trial, with its attendant costs and protracted duration. It pleads as special plea that:

> "*This Honourable Court does not have jurisdiction to hear this matter. The reason being that this is a dispute at common law between an employer and an employee in the course of employment. Section 8(1) of the Industrial Relations Act 1/2000 (sic) gives exclusive jurisdiction to the Industrial Court of Swaziland to hear and determine such matters.*"

[14] I do not deem it necessary to fully deal with all aspect referred to in the arguments filed on behalf of the litigants, since the legal: position has by now been crystallized in the highest courts of Swaziland. This court is bound to follow precedent in accordance with *stare decisis,* a well-entrenched principle in our legal system. I may well add that the heads of argument prepared by Mr. Vilakati would have been most helpful when the precedents were decided in accordance with his argument. Also, had the Plaintiff timeously conceded the point, which he ought to have done if his legal representatives kept abreast with judgments of especially the Supreme Court and Industrial Court of Appeal, his claim might well have been adjudicated in the appropriate *forum* by now, instead of the protracted of

enrolments and removals from the roll which has characterized this matter thus far. The history recorded on the court file indicates that as long ago as July 2006, argument would have been heard. In all, it was before five different judges on fifteen different occasions. Whatever the reasons for it might be, it is wholly unacceptable for a matter like this to be delayed like that. It is an indictment against the good administration of justice and gives cause for serious concern. Just the legal costs alone will be astronomical by now.

[15] In deciding the question of which court has appropriate jurisdiction to hear the matter, it is necessary to first determine the relative positions of the litigants. The defendant is the Government of Swaziland, a very wide concept, but also the biggest employer in the Kingdom. The plaintiff is an individual, who rendered services as chauffeur to the defendant. Is their relationship one of employer and employee, or is it something different?

[16] The plaintiffs attorney argues that it is not able to be construed as an employer and employee relationship and says that if it were to be so, "*the position in which the Plaintiff was engaged would not have been redundant*". He further argues, if the plaintiff was an "employee" in the strict sense, "*then he would have continued in his duties as*

a driver (chauffeur) of the subsequently appointed speaker of Parliament or he would have been redeployed".

[17] I fail to understand to rationale behind this argument but the plaintiff has it that it forms the basis to distinguish between a contract of (service) employment and a contract for services rendered over a specified fixed period. Also, the contract of employment that the plaintiff relies upon is pleaded to be for a fixed term of five years but on the other hand, the document he attached to the summons, annexure "TD1" is devoid of such fixed term. On the contrary, the "*Terms of Service (probation/contract etc)*" clearly specifies it to be "*TEMPORARY*".

[18] In my view, based on the material placed before the court, the inevitable conclusion is that the plaintiff was employed by the Government as a temporary employee, whose job description was that of a "*chauffeur Grade A5*" deployed at the Parliament with one Themba N. Dlamini as supervisor. The employer and employee relationship originated through the Civil Service Board, an applicable Government Civil Service

salary scale was payable as remuneration with an annual incremental date - all indicative of temporary employment in the civil service. The plaintiff was not contracted to perform a specified task, such as constructing some building or painting of a structure. He was to be a chauffeur, employed on a temporary basis.

[19] The plaintiff refers to the control, organizational and dominant impression tests to distinguish between a contract *of* services and a contract *for* services. His attorney argues that the dominant impression test, which considers a multiplicity of factors such as the contract itself, is of particular relevance. He says that if the individual's personal services were the object of the contract he would be an employee and if it were a product resulting from the service he would be an ^ independent contractor. Especially when regard is given to the authorities he relies upon and the criticism he levels against it, I yet again fail to understand that it provides support for any other finding that the plaintiff was an employee of Government.

It was in the course of the employment relationship between them that employment was terminated and which caused the plaintiff to sue his employer. In DEMPSEY V

HOME AND PROPERTY (1995) ILJ 378 (LAC) at 381 B-C the South African Labour Appeal Court interpreted the definition of an employee and held that -*.. no single factor is considered determinative and the court has to examine the relationship in its totality to identify those aspects of their relationship which tend to indicate the existence of an employment relationship, other than that of master and servant. The factors are then weighed as against each other...*"

In HANNAH V GOVERNMENT OF THE REPUBLIC OF NAMIBIA 2000 (4) SA 940 (NMLC) NGEOPE AJ (as he then was there), held at page 943 that:

> "*Although in itself not conclusive, the presence or absence of supervision and control will be a relevant factor: considerable measure of supervision and control will tend to indicate a master and servant relationship ... there are several authorities on this point... In PAXTON V NAMIB RAND DESERT TRAILS (PTY) LTD 1988 (1) NLLR 105 (NLC) it was stated (at 111) that, although the exercise of control has been watered down from being decisive, it remains a very important yardstick and perhaps even an indispensable one*".

On the very limited facts that have been made known to

this Court at the present stage, very little is known about the measure of supervision and control that Government could exercise over the plaintiff, through its various functionaries. It is known that the Civil Service Board played a major function when it not only appointed the plaintiff but also when terminating his services. This alone augurs strongly against a finding that it was a mere contractual relationship and not that of master and servant.

[23] By also requiring of the plaintiff to complete an official secrets declaration form and an income tax form which
was to be forwarded through his Head of Department to
the Accountant General, further measures of control and
supervision are established. His Head of Department was also to determine his instructions for taking up of his duties through the Clerk at Parliament (see annexure
"TD1"). *A fortiori* the plaintiff is found to be an employee
of the Defendant *qua* employer, instead of him being an
independent contractor to the Government, merely to perform a specific contract of work. Thus, the

relationship is one of master and servant, an employer and employee, regulated by the common law contract of

service. - . ■■_

[24] In order to bring the matter within the jurisdiction of the High Court and not the Industrial Court, the plaintiff endeavoured to say that the action merely arises from a unilateral and unlawful breach and repudiation of a contract that entitles him to sue for damages. His attorney then argues to say that the Industrial Relations Act of 2000 supplements the common law rights of an employee whose employment might be lawfully terminated at the will of the employer, summarily so or by way of notice. He then continues to say that it is the duty of the courts to protect the rights of an employee whose employment may be terminated lawfully but in circumstances that are nevertheless unfair. He therefore submits that these proceedings do not seek to challenge the lawfulness or otherwise of the termination but to obtain damages for undue repudiation of the contract. It is therefore, he argues, that the Industrial Relations Act (IRA) has no application, since the plaintiff purely on a contractual basis, sues for damages and not to obtain an order for

reinstatement or for an enquiry into the lawfulness or otherwise of the defendant's action to terminate the appointment.

[25] I respectfully cannot agree with the plaintiffs line of argument. Part of the fallacy thereof is that it presupposes the Industrial Court being devoid of the ability to award damages for breach of employment contracts. The Plaintiff, to be awarded contractual damages, pleads that appropriate relief would be dependant on a finding of unlawful repudiation or early termination of such contracts. In this regard, Section 16(9) of the IRA allays his apprehension as it provides that:

"*Compensation awarded under this section is in addition to, and not in substitution for, any severance allowance or other payment payable to an employee under any law, including any payment to which an employee is entitled under his or her contract of employment or an applicable collective agreement*". In addition, Section 8(3) has it that:

"*In the discharge of its functions under this Act, the (Industrial) Court shall have all the powers of the High Court, including the power to grant injunctive relief.*

The South African case of FEDLIFE ASSURANCE LTD V WOLFAARD (2001) 22 ILJ 2407 (SCA) is relied upon by the

plaintiff as averred authority for the proposition that the common law action for unlawful repudiation of a fixed term contract of employment falls outside the jurisdiction of the Labour Court. Indeed it is correct that the Supreme Court held that to be so but it is quite inappropriate to deem it as authoritative for Swaziland. Our Industrial Court has quite a different jurisdictional mandate as the narrower position in South Africa. The South African legislation, such as Section 157 of their Labour Relations Act, does not empower their Labour Court to adjudicate disputes about the unlawfulness of a dismissal, contrary to Section 8(1) of the Swazi Industrial Relations Act of 2000 (Act 1 of 2000). It reads:

> "*The Industrial Court shall, subject to sections 17 and 65, have exclusive jurisdiction to hear, determine and grant any appropriate relief in respect of an application, claim or complaint or infringement of any of the provisions of this, the Employment Act, the Workmen's Compensation Act, or any other legislation which extends to the Court, or in respect of anu matter which may arise at common law between an emplouer and employee in the course of employment or between an employer or employers' association and a trade union, or staff association or between an employees association, a trade union, or staff association, a federation and a member thereof* (emphasis added).

The Plaintiffs action for damages arising from breach of an employment contract is a dispute at common law between an employee and his employer, in the course of employment. Disputes emanating from such alleged breaches full squarely within the legislated framework of the jurisdiction conferred upon the Industrial Court, exclusively so. The decision of FEDLIFE V WOLFAARD *(supra)* thus cannot be relied upon to locally remove that exclusive jurisdiction. It also does not infer jurisdiction upon the High Court of Swaziland, despite its inherent jurisdiction, to adjudicate disputes about alleged unlawfulness of an employee's dismissal from his employment.

[28] Furthermore, despite its reliance upon FEDLIFE V WOLFAARD, the plaintiff then proceeds to shoot itself in the foot by submitting that "*such line of argument flies in the face of the principles of justice and fairness*". Yet again, I have to confess my failure to understand the rationale of the argument advanced on behalf of the plaintiff.

[29] Although the High Court of Swaziland has original and unlimited jurisdiction in both civil and criminal matters as reaffirmed in Section 151(1) of the Constitution of the Kingdom, the very same constitution also reconfirms the by now well established legal position that it does not to also

extend to matters which fall under the exclusive jurisdiction of the Industrial Court (Section 151(3)). In a wide sense, the Industrial Court exclusively deals with labour disputes, *inter alia* "*... in respect of any matter which may arise at common law between an employer and employee in the course of employment...*" as per the dictates of Section 8(1) of the IRA, quoted above.

[30] If any uncertainty remained in the mind of Plaintiffs counsel about the jurisdiction of the High Court and the exclusive jurisdiction of the Industrial Court, it has been removed by three semi recent judgments on appeal. In DELISIWE SIMELANE V THE TEACHING SERVICE COMMISSION AND ANOTHER (unreported) Civil Appeal Case No.22/2006, the Supreme Court unanimously held per Zietsmann JA at pp 10-11 that: -

> "*In my opinion the wording of Section 8(1) of the 2000 Act can be interpreted in one way only and that is that the Industrial Court now has exclusive jurisdiction in matters arising at common law between employees in the course of employment*".

[31] The Supreme Court (per Ramodibedi JA) unanimously drew a similar conclusion in SWAZILAND BREWERIES & ANOTHER V CONSTANTINE GININDZA, (unreported) Civil

Appeal Case No.33/2006 at paragraph 11:

> "*The effect of this change,* (in the re-wording of section 8(1) of the IRA, by omitting the words "any
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> matter properly brought before it" *read with the use*
>
> *of word "exclusive" in the section makes it plain in*
>
> *my view that the intention of the Legislature in enacting Section 8(1) of the Act was to exclude the*
>
> *High Court's jurisdiction in matters provided for under the Act and thus to confer exclusive jurisdiction*
>
> *in such matters on the Industrial Court*". .

The court went on to say at paragraph 14 that:

> "*In my view Section 151(3) (of the Constitution of Swaziland) does two things in so far as is relevant to this case: -*
>
> *(l) In plain and ambiguous language, the section ousts the jurisdiction of the High Court in any matter in which the Industrial Court has exclusive jurisdiction. To that extent, therefore, it stands to reason that there can be no question of the High Court and the Industrial Court enjoying concurrent jurisdiction.*

[2) In terms of the section (Section 151 of the Constitution) the inherent original jurisdiction ordinarily vested in the High Court does not detract from the exclusive jurisdiction of the Industrial Court in dealing with matters provided for under the Act". Although the context differed in that the focus fell on the power to review decisions of statutory administrative bodies, the same conclusions relating to the exclusive jurisdiction of the Industrial Court were drawn by the

Industrial Court of Appeal in MOSES DLAMINI V THE TEACHING SERVICE COMMISSION AND ANOTHER, Appeal Case No. 17/2005.

[33] It is for the reasons as stated above that this court cannot agree with the contentions held out by the Plaintiff, namely that it is the High Court of Swaziland which properly has jurisdiction to entertain his claim. The matter arises from a dispute between an employee and his employer, in the course of employment, within the common law ambit of master and servant. It is a labour dispute, which falls within the exclusive jurisdiction of the Industrial Court, as per the dictates of Section 8(1) of the Industrial Relations Act, 2000 (Act 1 of 2000).

[34] Therefore, it is ordered that the special plea be upheld

and the action that was instituted in the High Court instead of the Industrial Court is dismissed, with costs.

J.P. ANNANDALE

Judge of the High Court