



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No. 3814/2010

In the matter between:

DUMSILE SIMELANE

Plaintiff

And

NHLANHLA SHONGWE

1st Defendant

PRINCIPAL SECRETARY – MINISTRY

OF PUBLIC WORKS & TRANSPORT

2nd Defendant

ACCOUNTANT GENERAL

3rd Defendant

THE ATTORNEY GENERAL

4th Defendant

Neutral citation: Dumsile Simelane v Nhlanhla Shongwe & 3 Others (3814/2011)
[2013] SZHC 22 (28th February 2013)

Coram: M. Dlamini J.

Heard: 4th December 2012

Delivered: 28th February 2013

Action proceedings – claim arising out of negligence – defendant objection to jurisdiction – property of plaintiff damaged while conveyed by employer

– whether High Court has original jurisdiction – Section 8 (1) of Industrial Relations Act 2000 as emended.

Summary: By means of combined summons, the plaintiff claims for damages as a result of 1st defendant negligent driving while transporting her household implements to her homestead. 1st defendant was under the employ of 2nd defendant.

[1] The merits of the case in *casu* are still to be prosecuted. From the plaintiff's case, there was an oral agreement between defendants and herself to have her household goods transported from her work place to her homestead. While 1st defendant who was employed as a driver was conveying the goods, some fell off from the moving motor-vehicle and were damaged. Plaintiff claims for the value of the damaged goods to the total tune of E62,000-00.

[2] Defendants on the other hand, although pleaded to the merits of the case by denying any negligence on their part, on the day of trial, raised a special plea on lack of original jurisdiction by this court to entertain plaintiff's cause of action.

[3] My duty is to ascertain whether this is a matter properly before this court.

[4] I must point out from the onset that reading both the plaintiff's particulars of claim and defendant's plea, nothing points out that the oral agreement emanated from the employer-employee relationship which existed between the plaintiff and the government of Swaziland. This point was divulged during submission and was common cause between the parties. It further turned out that removal of plaintiff's goods from her place of employment

to her homestead was part of the employment benefits enjoyed by plaintiff. For reason that these two factors were common cause among the parties herein, I will take cognisance of the same.

[5] Defendant's Counsel has submitted that in terms of section 8 (1) of the Industrial Relations Act No.1 of 2000 (as amended) this court has no jurisdiction to entertain plaintiff's action.

[6] Section 8 (1) of the Industrial Relations Act No.1 of 2000 as amended reads:

“The Court shall, subject to section 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 jurisdiction to the court, or in respect of any matter which may arise at common law between an employer and employee in the course of employment or between an employer or employer s' association and trade union, or staff association or between an employees' association, a trade union, a staff association, a federation and a member thereof.”

[7] There is a plethora of decided cases on the question of jurisdiction of this court pertaining to matters arising out of master and servant relationship.

[8] **His Lordship Browde A. J. P. in Delisile Simelane v The Teaching Service Commission, Civil Appeal No.22 of 2006** called upon to give

meaning to the wording of section 8 (1) of 2000 Act stated at page 9 of the judgment:

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

[9] The **Honourable Ramodibedi J. A.** as he then was, in his wisdom, approached this question by highlighting the historic background of this section.

[10] At pages 4 to 6 of the written judgment of **Swaziland Breweries Limited and Another v Constantine Ginindza, Civil Appeal Case No.3 of 2006** His Lordship **Ramodibedi J. A.** states:

*“In order to understand the true import of Section 8 (1) of the Act, it is necessary to have regard to the history of industrial relations in this country. The forerunner to the current Act was the Industrial Relations Act No.1 of 1996 which in turn followed the Industrial Relations Act No.4 of 1980. This section was subject of interpretation in **Donald C. Mills – Odoi v Elmond Computer System (Pty) Ltd 1987 – 1995 (1) S. L. R. 102 H. C.** Inherent in **Dunn A. J.’s** decision was the notion that the Industrial Court enjoyed concurrent jurisdiction with the High Court provided the matter was properly before the former court in the sense that the procedures laid down in the Act in question were followed.”*

[11] At pages 6 his Lordship proceeds:

“The legislature responded by enacting the Industrial Relations Act No.1 of 1996 which repealed the 1980 Act.”

[12] Interpreting the corresponding section as amended by the 1980 Act, the court in **Sibongile Nxumalo and Others v Attorney General and Others Civil Appeal Nos. 25, 28 29 and 30 of 1996** his **Lordship Ramodibedi** in the same case at page 7 quotes as follows:

“In those matters which can be properly brought before the Industrial Court as set out in the Act, the appropriate forum is the latter court and to that extent the High Court’s jurisdiction is ousted. It is, however only in those matters that such ouster occurs.”

[13] Having eloquently highlighted the background the honourable judge then wisely concludes in unambiguous terminology at page 12:

“In the context of the legislature scheme and object of the Act as fully set out above, I am satisfied that the intention of the legislature was to confer exclusive original jurisdiction on the Industrial Court in matters provided for under the Act. Put differently, all such matters must first go to the Industrial court. It is only after the latter Court has made a decision or order in the matter that an aggrieved party may approach the High Court for review on common law grounds.”

[14] In **Swaziland Government v Zeblon Mhlanga, Case No.4159/08** my brother **Mamba J.** was faced with an application for ejection following respondent’s persistent refusal to vacate applicant’s premises which

respondent had occupied by virtue of an employment contract which was subsequently cancelled. An argument that as there was no employer – employee relationship, the application before court for ejectment was in order was raised by applicant upon respondent raising a point on want of jurisdiction. The learned judge basing his decision on the interpretation of section 8 (1) of the Industrial Relations Act reveals at paragraph 6:

“In the present application it has been argued by the applicant that its cause of action for ejectment of the respondent from its house is the respondent’s illegal occupation thereof after his dismissal from employment. The matter, so the argument went, is not one arising in the course of employment as stated in the subsection. Superficially or at glance, this argument may sound attractive...”

[15] The learned judge holds at paragraph 11 of the judgment:

“I accept that the applicant is exercising its common law rights to eject the respondent from its house. This is, however, on a matter arising in the course of employment. Put differently, it was during or in the course of employment that the employment contract was summarily cut short by the dismissal of the respondent by the applicant. That automatically ushered in the right of the owner of the property to retake possession of it. It is a cause and effect situation or chain. It would be rather artificial or casuistic to hold that the occupation of the dwelling by the respondent, post or after his dismissal was a totally new and separate one. The break in the chain contended for by the applicant is imaginary or at least treated as such by the Industrial Relations Act.”

[16] In *casu*, there was no argument put of the break in the relationship between plaintiff and defendants the ratio *decidendi* by his **Lordship Mamba J.** is cited in order to point out that even if the argument should be carried to that extent (*as it is clear that plaintiff was returning home from her duty station herein*) her action is a claim arising at common law flowing from an employer – employee relationship.

[17] In this regard, the point in *limine*, raised by defendant’s counsel is upheld and the following order entered.

1. Plaintiff’s action is dismissed.
2. Plaintiff is granted leave to institute action at Industrial Court, if so inclined;
3. Costs to follow the event.

M. DLAMINI
JUDGE

For Plaintiff : **Mr. H. Mkhabela**
For Defendant : **Mr. T. Vilakati**