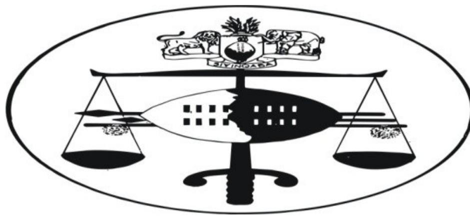

IN THE HIGH COURT OF ESWATINI

JUDGMENT

CIVIL CASE NO: 1092/20

In the matter between:

MYENGWA MACUBA SIBANDZE	**APPLICANT**

AND

NATIONAL FOOTBALL ASSOCIATION OF ESWATINI	**1ST RESPONDENT**
ADAM MVELI MTHETHWA	**2ND RESPONDENT**
TIMOTHY SHONGWE	**3RD DEFENDANT**
WELILE MABUZA	**4TH DEFENDANT**

Neutral Citation: *Myengwa Macuba Sibandze vs. National Football Association of Eswatini and 3 Others (1092/20) [2020] SZHC (211) 16th October 2020*

Coram: **MLANGENI J.**

Date Heard: **13th October 2020**

Date Delivered: **16th October 2020**

Flynote: *Law of delict – Plaintiff claiming consequential damages arising from employer – employee relationship – defendants raising special plea that High Court has no jurisdiction to hear the matter in view of the exclusivity of the jurisdiction of the industrial court in labour related matters.*

Section 151 (3) (b) of the Constitution referred to.

Section 8 (1) of the Industrial Relation Act 2000 considered in comparison with the equivalent section in the 1996 Industrial Relations Act.

Held: *The High Court does not have jurisdiction. Special plea upheld with costs.*

JUDGMENT

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[1] The plaintiff, who was in the employ of the First Defendant, was dismissed on the 3rd March 2005. The dismissal was declared unlawful by the Industrial court and the plaintiff was awarded compensation under a number of heads, totaling about E500, 000.00. By summons dated 11th June 2020 the plaintiff now claims from the four defendants an amount of Ten Million Emalangeni (E10, 000,000.00).

[2] The defendants have raised the special pleas of *res judicata,* misjoinder and lack of jurisdiction on the part of this court. It is settled that jurisdiction is a threshold issue which, if raised, must be dealt with first, for it determines whether the court can embark upon and determine any of the other issues that are raised in the *lis*. I therefore proceed to interrogate the issue of jurisdiction and, depending on the conclusion I

come to, it may or may not be necessary to deal with the other special pleas and/or objections.

[3] It is an interesting coincidence that in his particulars of claim the plaintiff has not made the usual averments relating to the court having jurisdiction to deal with the matter. The plaintiff's argument is that a plaintiff does not need to allege the existence of jurisdiction; it is enough to make averments of fact that show that the court does have the necessary jurisdiction to deal with the particular matter or claim. If the plaintiff's argument is correct, what it means is that courts would often need to search through the particulars of claim, no matter how bulky, to establish whether they are clothed with jurisdiction or not. I am not persuaded by this line of argument, but on the facts before me it is not necessary to decide this point and I leave it for another day and time.

[4] What I need to focus on are the relevant statutory provisions which determine this aspect of the matter.

THE CONSTITUTION

[5] Section 151 (3) (b) provides that the High Court **"has no original or appellate jurisdiction in any matter in which the Industrial Court has exclusive jurisdiction."**

THE INDUSTRIAL RELATIONS ACT 2000

[6] The jurisdiction of the Industrial Court is explicitly established in Section 8(1) of the Industrial Relations Act 2000 as amended. This sub-section is in the following terms:-

> "**The 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 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 employee's association, a trade union, a staff association, a federation and a member thereof.**"

In my opinion there is no better example of an exhaustive piece of legislative.

[7] The plaintiff, whose rights arise exclusively from an employer and employee relationship, has approached this court in pursuit of what he perceives to be his rights at common law, being a claim for consequential damages in a staggering amount of Ten Million Emalangeni. I make a passing observation that the quantum claimed suggests that the drafter of the claim was probably as emotional as his client. Legal practitioners need to guard against this as an unrealistic claim may have a bearing on legal costs[1].

[1] Phila Buthelezi and Another v Mbongeni Ndlela and Another (1737/15) [2020] 174.

[8] The plaintiff submits that he is entitled to pursue the consequential damages before this court because it is an aspect that was not dealt with by the Industrial Court. This is of relevance to the issue of *res judicata* but I am mentioning it in a different context here. What is of significance, though, is that the plaintiff is not arguing that he was not entitled in law to pursue this claim in the Industrial Court. And in my view he cannot make this argument in view of the wide net that is cast in Section 8(1) of the Act. In legal submissions the plaintiff made much of the judgment in EDWARD MBUYISELO MAKHANYA v THE UNIVERSITY OF ZULULAND[2] in which the employee sought to enforce his contract of employment against the employer, at the common law courts, and the Supreme Court of Appeal held that he was entitled to do so. So the argument is that this choice which exists in the Republic of South Africa is also available in this country.

[9] What this argument overlooks is that in South Africa this choice is created by the express provision of a statute, Section 77(3) of the Basic Conditions of Employment Act No.75 of 1997 which expressly gives authority to the High Court in that country to enforce contracts of employment concurrently with the labour courts. This concurrent jurisdiction also has constitutional authority in South Africa. See Nugent JA in Edward Mbuyiselo Makhanya, supra, at paragraphs 15 and 16.

[10] This position does not obtain in this country, there is no provision for the concurrent jurisdiction. As a matter of fact it is apparent that the addition in the 2000 Act of **"any matter which may arise at common law between an employer and employee in the course of**

[2] (218/08) [2009] ZASCA 69

employment" was specifically intended to shut this door and it did in my view shut the door.

[11] The position that I have stated above finds support in this jurisdiction in the very recent judgment of Her Lordship M. Dlamini J. in the matter of VUSUMUZI CORNELIUS SHONGWE v PRINCIPAL SECRETARY – MINISTRY OF PUBLIC WORKS AND TRANSPORT AND TWO OTHERS[3]. In this matter a former employee sued his former employer in the High Court for E1.2 million, allegedly because he as **"wrongfully and unlawfully classified as temporary employee by the defendant."** The defendant raised a special plea that the High Court has no jurisdiction over the matter, the Industrial Court having exclusive jurisdiction. After embarking upon a comparison of the equivalent provisions in the 1996 IRA and in the 2000 IRA the court came to the conclusion that the 2000 Act extended the jurisdiction of the Industrial Court to claims arising at Common Law. This was clearly intended to further fortify and consolidate the exclusivity of the Industrial Court in matters arising out of an employer and employee relationship.

[12] At paragraph [28] of the judgment Her Lordship summarises the position as follows:-

> **"……whereas before the latter part of 2000, the jurisdiction of the Industrial court was provided only by legislation, with the advent of Act No.1 of 2000, the Industrial Court's jurisdiction could be sourced beyond legislation. Common Law *strictu sensu* is also a source for the Industrial Court's jurisdiction."**

I cannot agree more.

[3] (1344/06) [2020] SZHC 59

[13] Flowing from the above, the defendant's special plea regarding jurisdiction succeeds and there is no need for me to interrogate the other points raised by the defendants. I therefore make the following orders:-

13.1 The action is dismissed.

13.2 Costs to follow the event.

T.M. MLANGENI

JUDGE OF THE HIGH COURT

For the plaintiff: **Attorney Mr. A.C. Hlatshwayo**

For the Defendants: **Attorney Mr. H. Mdladla**