IN THE HIGH COURT OF ESWATINI

JUDGMENT

In the matter Between: Case No.1344/2006 &
174/2020

VUSUMUZI CORNELIUS SHONGWE Plaintiff

and

PRINCIPAL SECRETARY-MINISTRY OF

PUBLIC WORKS AND TRANSPORT AND

TWO OTHERS 1st Defendant

THE CHAIRMAN – CIVIL SERVICE BOARD 2nd Defendant

THE ATTORNEY GENERAL 3rd Defendant

Case No. 174/2020

JOSEPH NDZIMANDZE Plaintiff

and

STEALTH SECURITY (PTY) LTD Defendant

Neutral citation	:	***Vusumuzi Cornelius Shongwe v Principal Secretary Ministry of Public Works and Transport and Two Others (1344/06) & Joseph Ndzimandze v Stealth Security (Pty) Ltd (174/2020) [2020] SZHC 59 (3rd April, 2020)***
Coram	:	**M. Dlamini J**
Heard	:	**04th March. 2020**
Delivered	:	**3rd April, 2020**

Jurisdiction ***:*** ***Comparative analysis of section 5 of Act No.1 of 1996 and Act No. 1 of 2000 – Act 1996 confined jurisdiction of Industrial Court to legislative provision while Act 2000 extended it to common law strict sensu – this Court has no original and appellate jurisdiction over matters where the relationship is that of employer-employee or trade association***

Summary: The plaintiffs' causes of actions are based on delictual claims. Plaintiff in case No. 1344/2006 alleged that as a result of 1st defendant's conduct of engaging him as a temporal employee from 1975 to 2002 he suffered damages to the sum of E1.2 million. The plaintiff in case 174/2020 claimed that plaintiff negligently terminated his employment. He demanded the sum of E150,000. The defendants in both cases have raised a special plea of lack of jurisdiction.

The parties

[1] Both plaintiffs are adult emaSwati males. The plaintiff under the first case resides at Mbabane, Hhohho region. The subsequent plaintiff is a resident of Mbikwakhe, Manzini region.

[2] The 1st defendant is the administrator of the Ministry of Public Works and Transport whose heard office is at Mbabane, region of Hhohho. The 2nd defendant is task with employing all civil servants in the kingdom and is the head. The 3rd defendant is so cited as the legal advisor and representative of the Government. Its chambers are at 4th floor, Justice Building, Ministry of Justice and Constitutional Affairs, Mbabane, Hhohho.

[3] The defendant in case No. 174/2020 is a company duly registered as such in terms of the Company laws of the Kingdom. Its principal place of business is the Industrial Site Matsapha, region of Manzini.

The Plaintiffs' Particulars of Claim

Case 1344/2006

[4] The plaintiff, drawing his claim, first asserted that this court has jurisdiction in the following manner;

> *"5. This Honourable Court has jurisdiction over this matter by virtue of the fact that the course of action arose within Swaziland."*[1]

[5] On the merits, plaintiff alleged that on 21st July, 1988, he was engaged by 1st defendant as an electrician on a temporary basis. He continued to work until his retirement on 31st December, 2002. In July 2000, plaintiff instituted action proceedings at the Industrial Court under case No: 216/2000. Judgement was delivered on 27th October, 2004 where the court held, "*plaintiff was wrongfully and unlawfully classified as temporary employee by the defendant.*"[2]

[6] The court, so alleged the plaintiff, proceeded to direct that "*plaintiff may seek damages in an appropriate forum*."[3]

[7] As a result the plaintiff claimed before this court the following as damages suffered:

> "*(a) Payment of the sum of E1.2 million;*
>
> *(b) Interest at the rate of 9% per annum;*
>
> *(c) Costs of suit;*

[1] Paragraph 5, page 6 of pleadings
[2] See para 7(ii) of page 7 of book of pleadings
[3] paragraph 7 (iii) of page 7 of book of pleadings

(d) Further and/ or alternative relief."[4]

Plea

[8] On the merits, defendants put plaintiff into strict proof on the basis that the plaintiff was engaged for purposes of a project which was temporary in nature. He was paid on a daily rate. The plaintiff could not be a permanent civil servant as the nature of his obligations were for a defined period.

Replica

[9] The plaintiff replicated and denied defendants' plea. He pointed out that he was an electrician engaged to maintain government buildings.

Procedure

[10] On the 29th January, 2020 this court granted a hearing date for the matter as 4th and 5th March, 2020. On the 3rd March, 2020, a day before the trial, defendant filed a notice insisting on a special plea filed by it on 21st September, 2012. When the matter came before me on 4th March, 2020, the defendant applied that the special plea be argued.

[4] Para 11 at page 9

[11] **Case 174/2020**

I must point out from the onset that it became clear to me as I read the plaintiff's Particulars of Claim that they were not drafted by a lawyer. The Particulars of Claim leaned on the side of evidence than particulars. The address at the foot of the particulars reflected that the plaintiff was in person. For that reason, the court had to proceed with the matter and ignore that the Particulars of Claim did not comply with the Rules.

[12] This matter appeared on the Motion Roll. When the name of the plaintiff was called, he was nowhere to be seen. The defendant's Counsel applied that the special plea be decided upon.

[13] In summary, the plaintiff alleged that on 17th January, 2017, Phoenix Security took over the business of the defendant. He lost his employment in the process. He reported the matter to Conciliation, Mediation and Arbitration Council who later issued a certificate of unresolved dispute. He then instituted proceedings before this court, claiming the sum of E150 000 as a result of defendant's gross negligence.

[14] The plaintiff herein did not respond to defendant's special plea. It was submitted on behalf of defendant that his corresponding attorney pointed out that the plaintiff's whereabouts were not known.

Special Plea

[15] Defendant was very succinct in its special plea. It pointed out that Section 8(1) of the Industrial Court clothed the Industrial Court with exclusive jurisdiction over labour dispute. The plaintiffs' causes of actions were based on lost benefits and gross negligence. These were according to defendant a labour dispute. Section 8(1) had to be invoked. Defendant further contended that Section 15(3)(a) of the Constitution states that this court is neither a court of original or appellate jurisdiction over industrial matters.

[16] Turning to the judgement of the Industrial Court delivered on 27th October, 2004 under Case No: 216/2000 the defendant submitted that when the court issued its judgement, it considered that plaintiff's case was registered in terms of the Act regulating the Industrial court then. It relied on a section which at the time of plaintiff filing its action limited the jurisdiction of the Industrial Court. However, that Act was repealed and replaced by the Industrial Relations Act of 2000. Under section 8(1) of the Industrial Relations Act 1 of 2000, the jurisdiction of the court was extended to include any claim arising from an employer employee relationship.

[17] In response, it was contended that the plaintiff subsequent action before this court was pursuant to a judgement delivered by the Industrial Court directing that the plaintiff sue out summons for damages at the correct forum. This forum is the High Court.

Preliminary

[18] What needs to be highlighted is that plaintiff (first case) stated in his Particulars of Claim that at the end of his engagement with defendant, he received his gratuity and other benefit. The cause of complaint is that such were of a lesser magnitude than those received by permanent employees of defendant who had served a similar period as plaintiff.

Case No. 216/2000 – Industrial Court's judgment

[19] In a long and well-reasoned judgement on plaintiff's law suit at the Industrial Court where plaintiff sought to compel defendant to declare him a permanent and therefore pensionable civil servant, **Nderi Nduma J** opined:[5]

> *"From the exegesis afore-running, it is without doubt that the Applicant was not a temporary employee and was wrongfully and unlawfully classified as such. Since however he made no contributions to the fund due to the fault of the Respondent, and no contribution was made on his behalf, the court is unable to declare his position as pensionable within the meaning of the Public Service Pension Order 1973 and the Fund's Regulations of 1993. **The Applicant may have to seek damages in an appropriate forum**."*

Issue

[5] Page 17 of book of pleadings

[20] Which is this appropriate forum where the plaintiff had to sue for a new cause of action i.e. damages?

Common Cause

[21] It is common cause that when the plaintiff instituted Case No: 216/2000 at the Industrial Court, the operational law was the Industrial Relations Act No.1 of 1996. When the judgement was delivered in 2004, the Industrial Relations Act No.1 of 1996 had been repealed and replaced by the Industrial Relations Act No. 1 of 2000.

Adjudication

[22] The Industrial Relations Act No.1 of 1996, section 5 (1) reads:

> *"5. (1) The Court shall have exclusive jurisdiction to hear, determine and grant any appropriate relief in respect of any matter properly brought before it including an application, claim or complaint or infringement of any of the provisions of this Act, a workmen's compensation Act or any other legislation which extends jurisdiction to the Court in respect of any matter which may arise at common law between an employer and employee in the cause of employment or between an employer or employers' association and an industry union, between an employers' association, an industry union, an industry staff association, a federation and a member thereof."*

[23] Section 8 (1) and (3) of the Industrial Relations Act No: 1 of 2000 reads:

> "*(1) 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 and employee's association and a trade union, or staff association or between an employees' association, a trade union, a staff association, a federation and a member thereof.*
>
> *(3) In the discharge of its functions under this Act, the Court shall have all the powers of the High Court, including the power to grant injunctive relief.*"

Did the 2000 Act introduce any inroads?

[24] A comparison needs to be made between sections 5 of Act 1996 and section 8 of Act 2000.

Section 5 of Act 1 of 1996: It partly reads**:**

“***or any other legislation which extends jurisdiction to the Court in respect of any matter which may arise at common law*** *between an employer and employee in the course of employment…”*

Section 8(1) of Act No. 1 of 2000 partly states:

“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 …”**

[25] In the 1996 Act, the use of “**or**” is aligned to a legislation which supports a claim arising from common law. In other words, a litigant intending to sue for a claim arising out of common law such as damages as a result of an industrial or employer-employee relationship ought to rely on a statutory enactment to institute its case before the Industrial Court. Without a legislation clothing the Industrial Court with the power to hear and determine such common law right or cause of action, the litigant would be thrown out for want of jurisdiction.

Did this position change under Act No. 1 of 2000?

[26] A reading of the entire section 5 of Act No. 1 of 1996 demonstrates that the legislature prescribed that the power of the Industrial Court to hear and determine matters before them emanated firstly from the

enabling Act itself (1996), or secondly from the Workmen's Compensation Act or thirdly from any legislation which by the use of "*extending jurisdiction*" specifically clothed the Industrial Court with jurisdiction to entertain matters before them albeit the cause of action or right arose from common law. There was further a clear overall factor which was that those matters must be of employer-employee or trade association's relationship.

[27] As highlighted in the paragraph seeking to make the comparison above, section 8(1) of Act No. 1 of 2000 incorporates a new phrase which is not in section 5 of Act No. 1 of 1996. This new phrase is inclusive of a comma and the word "or." It thus reads, "***, or in respect of any matter which may arise at common law between an employer and employee…"*** Now that means the Legislature by so adding the comma and "or" intended to extend the powers or jurisdiction of the Industrial Court by not only confining it to matters provided for by legislation which is two-fold, *viz*., one creating right or claim and the other reinforcing causes or rights found in common law. In other words, a party need not refer to pieces of legislation to enquire whether the Industrial Court has jurisdiction where common law creates such right or claim. He only has to ask one question in terms of section 8(1) of Act 1, 2000: Is there an employer-employee or trade association relationship between me and my adversary? If the answer is, "yes," then the Industrial Court has the original jurisdiction. Worse still, this jurisdiction is at the exclusion of other courts. The reason is that the 2000 Act extended the powers of the Industrial

Court from legislative based to common law matters. So before the latter part of 2000, a litigant had to ask two questions before instituting his case at the Industrial Court. Firstly, is there an employer-employee or trade association relationship between me and my opponent? Secondly, is there any legislation conferring the Industrial Court with the power to hear and determine my case? This legislation must either have created the right or claim or reinforces a common law one. With the enactment of Act 2000, the litigant only asks one question and that is the first one. If the answer is positive, then he may institute his claim. Of course there must be a *causa* provided for either by statute or common law.

[28] In summary, 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 strict *sensu* is also a source for the Industrial Court's jurisdiction. What is this common law which provides the Industrial Court with jurisdiction? It is that whatever dispute at law so long as there is a relationship of employer- employee or trade association.

<u>Cases at hand</u>

[29] In the cases at hand, both plaintiffs are claiming for damages as a result of employer-employee relationship. The Industrial Court is fully seized as a Court of first instance. In fact as correctly pointed

out by Counsel on behalf of defendants under case No. 1344/2006, this court, although more often said to have inherent and original jurisdiction over all matters arising within the Kingdom, such jurisdiction is ousted by section 8(1) and (3) of the Industrial Relations Act No.1 of 2000. An appeal lies with the Industrial Court of Appeal and not with this Court.

Nduma J's judgment – Does it oust the jurisdiction of the Industrial Court?

[30] The obvious answer must be a certain "No!" It is therefore my considered view that when the learned Justice referred the plaintiff's matter to the "*appropriate forum*" he did not by any means mean that the plaintiff should not institute his claim for damages in the Industrial Court. At any rate the un-impugned judgment of **Nduma J.** found that the plaintiff's claim was impossible to grant as he had demanded to be classified as pensionable for the reason that he could not be so declared following that he did not make any contribution to the pension fund during his employment with the 1st defendant. The court was of the opinion that he should institute fresh summons and claim for damages. When the learned judge therefore referred the matter to the "*appropriate forum*," he meant the same Court. It was therefore an unfortunate error for him to be misunderstood to mean not the Industrial Court. The new Act No. 1 of 2000 empowered the Industrial Court to deal with the claim for damages by virtue of section 8(1) as demonstrated herein.

Costs

[31] By reason that these are matters of bread and butter and the practice in such matters is that an order of costs should not be granted, I am inclined not to mulct plaintiffs with costs of suit. The general rule that costs follow the event therefore shall not apply.

Orders

[32] In the result, I enter the following orders:

1. Defendants' special plea succeeds;

2. Plaintiffs' main courses of actions both under cases No. 1344/2006 and 174/2020 are hereby dismissed.

3. No order as to costs.