IN THE INDUSTRIAL COURT OF ESWATINI

HELD AT MBABANE **CASE NO. 276/2022**

In the matter between:

MZWANDILE LESLIE NKAMBULE Applicant

And

MONDELEZ INTERNATIONAL Respondent

Neutral citation: Mzwandile Leslie Nkambule vs Mondelez International [276/22) [2023] SZIC 25 (06 April, 2023)

Coram: **M. MOTSA - JUDGE**
(Sitting with Mr M.T.E Mtetwa and Mr A.M Nkambule, Nominated Members of the Court)

DATE HEARD: 13 March 2023

DATE DELIVERED: 06 April 2023

Summary: ***Applicant engaged on a fixed term contract and on ad hoc basis after the expiry of the contract brought an application on Notice of Motion against the Respondent seeking an order directing the latter to pay him the full salary he would have earned for the duration of the fixed term contract notwithstanding that he was never called to come and render any service. Respondent raised a preliminary point of law contending that the jurisdiction of this Court in ousted to deal with this matter in view of the provisions of Section 35(1) (b) and (d) of the Employment Act.***

Held: ***Previous legal authorities on the essence of the preliminary point of law are inviolable, however, on the facts the present matter is distinguishable from those matters, hence the provisions of Section 35 (b) and (d) are not applicable, points in limine dismissed. Held further that the IRA of 2000 (as amended) extends the jurisdiction of the Industrial Court to claims arising at Common Law - henceforth the Industrial Court has jurisdiction in this matter.***

JUDGEMENT

Introduction

[1] The Applicant a former employee of the Respondent instituted an application by way of notice of motion against the Respondent, a company duly incorporated and registered in terms of the company laws of the Kingdom of Eswatini, seeking orders in the following terms:

1. *That the Respondent be ordered to pay Applicant duration of the contract amount of E 41 472.00.*
2. *Cost of Application*
3. *Further and/on alternative relief [sic]*

[2] The application is opposed by the Respondent which has filed an Answering Affidavit in which it raised a preliminary point of law and also answered to the merits. During the arguments of the matter the parties agreed to deal with the matter holistically as opposed to only dealing with the preliminary point of law.

Applicant's case

[3] Applicant contends that on or about early 2019 he successfully applied for employment within the Respondent's undertaking for the position of Operator and at the beginning of February 2019 he was made to sign a ten (10) months fixed term contract of employment with the Respondent.

[4] The fixed term contract of employment which was signed by the parties on February 1, 2019 *inter alia* and in no particular order contained the following pertinent terms and conditions:-

4.1 The date of commencement of your fixed term employment is the 01st February 2019 until 30th November 2019. You shall be called in for work on an ad hoc basis as and when there is an operational need. Terms of this contract shall only be applicable in cases or instances where the Applicant had been called to work. [Our emphasis]

4.2 You will be required to work a 48 hour week or as otherwise agreed with his Manager and overtime will be required from time to time. [Our emphasis]

4.3 You will receive an hourly rate of E24.12 per hour .This salary will not later than the last working day of each month or a Fortnight be paid by direct deposit into a bank account of your choice... (sic).

According to the Applicant and which has not been disputed by the Respondent, this hourly rate translated to an amount of E2 304.00 in a fortnight and E4 608.00 per month.

[5] Applicant asserts that notwithstanding the fact that in terms of the fixed term contract he was to be called in to work on ad hoc basis as and when there was an operational need, ever since he signed the contract he was never called in to work by the Respondent until the fixed term contract lapsed.

[6] According to the Applicant, Respondent's failure to call him to come to work has prejudiced him because for the duration of the fixed term contract, he placed his personal service at the disposal of the Respondent and could not take advantage of other employment opportunities since he was contracted to the Respondent.

[7] Applicant avers further that during the whole period in question (1 February 2019 to 30 November 2019, Respondent furnished him with no explanation whatsoever to account for its failure to call him in for work.

[8] In his founding affidavit the Applicant stated that on or about 30 October 2019, he went out of his way, wrote and delivered a letter to the Respondent. In the letter he was reminding the Respondent about the fixed contract he had with them and enquiring why he had not been called to work. He stated further that he also informed the Respondent in that letter

that their failure to call him, in his view, amounted to a breach of contract and demanded compensation for the time he has stayed waiting in vain to be called to work. According to the Applicant Respondent did not respond to his letter of demand.

[9] The Applicant avers further that after the Respondent had neglected to respond to his letter of demand and further failed to pay him what was due to him for the duration of the contract, on 14 November 2019 he reported a dispute at the Conciliation Mediation and Arbitration Commission (CMAC) under Part VIII of the Industrial Relations Act No.1 of 2000 as amended (hereinafter referred to as **the IRA of 2000**). He asserts that the dispute was reported even before the expiry of the fixed term contract. He asserts that the matter was conciliated upon, consequent to which a certificate of unresolved dispute was issued.

[10] The Applicant also stated that this Honourable Court is vested with jurisdiction to hear and determine this matter in accordance with Section 8 (1) of the IRA of 2000 (as amended).

Respondent's case

[11] The Respondent does not dispute that it entered into a ten(10) months fixed term contract with the Applicant for the position of operator which the latter was to be paid E 24.12 per hour payable not later than the last working day of each month or on a fortnight.

[12] Before addressing the merits of the Applicant's claim Respondent raised a preliminary point of law pertaining to the jurisdiction of this Court to entertain this application.

[13] In this regard the Respondent contends that in terms of Section 35 (1) (b) and (d) of the Employment Act No.5 of 1980 (as amended) (hereinafter referred to as **the EA of 1980**), this Court lacks jurisdiction to deal with a claim where:

(i) The employee was required to work less than twenty one (21) hours per week;

(ii) The claim is arising out of a termination of a contract that has lapsed by effluxion of time; and

(iii) That the Court does not have jurisdiction to deal with a claim of prospective damages, where it is alleged that the employer failed to fulfill certain contractual obligations.

[14] It was argued for the Respondent that because of the nature of the fixed term contract obtaining between the parties, that is, Applicant was to be engaged on an ad hoc basis as and when there was an operational need during the subsistence of the contract Applicant would have worked less than twenty one (21) hours a week which would have been a contravention of the provisions of Section 35(1) (b) of the EA (as amended).

[15] In fact it was submitted further that when the contract lapsed in November 2019, Applicant had worked less than 21 hours per week, hence he cannot enjoy the protection of the provision of Section 35 (2) of the EA of 1980.

[16] In terms of Section 35 (1) (d) of the EA it was submitted for the Respondent that this section shall not apply to an employee engaged for a fixed term and whose term of engagement had expired. In this regarded it was argued that Applicant's claim is arising out of a termination of a contract that had lapsed by effluxion of time on 30 November 2019. It was contended strongly for the Respondent that Applicant had been engaged for a fixed term and the term of engagement had expired and hence he was not an employee to whom the provisions of Section 35(2) of the EA applies thus automatically ousting the jurisdiction of this Court.

[17] In the end it was submitted for the Respondent that the Applicant has failed to demonstrate and to establish that he is an employee to whom Section 35(2) of the EA applies since his fixed term contract had lapsed in November 2019 and further that during the subsistence of the contract Applicant worked less than 21 hours per week.

[18] In response to the first point above, it was argued for the Applicant that clause 4 of the contract expressly stated that the Applicant will be required to work a 48 hour week or as otherwise agreed with the Manager. According to the Applicant there is nowhere in the contract where it is stated that he was to work less than 48 hours a week. In fact according to

Applicant's reading of the clause 4 of the contract, he asserts that the minimum hours per week that he was supposed to work were 48 hours.

[19] In actual fact he argues that according to the contract he could work even more hours in a week depending on what could otherwise be agreed upon with the Manager or on operational needs from time to time and inclusive of overtime pay which is also envisaged in the contract. Applicant contends further that it was not his own doing that he did not render any service to the employer but this was Respondent's own doing.

[20] With regards to the Respondent's contention pertaining to Section 35 (1) (d) of the EA, it was argued for the Applicant that he did not start pursuing this claim only after the lapse of his fixed term contract; rather he initiated his claim firstly through the letter of demand dated 30 October 2019 and secondly, after receiving zero courtesy of a response from the Respondent, on 14 November 2019, he immediately reported a dispute at CMAC. The record confirms this assertion as the Report of Dispute marked **annexure "MN3"** to the Applicant's papers is dated 14 November 2019. It was received on behalf of Respondent on 15 November 2019 and brought back to CMAC after being served on 15 November 2019 as can be gleaned from the CMAC date stamp.

[21] In line with this reasoning, it was contended for the Applicant that it cannot therefore be accurate for the Respondent to argue that his claim emanates from a fixed term contract which had since expired since he began pursuing the claim during the subsistence of the contract. As such, it was asserted for

the Applicant that he has therefore demonstrated that he is an employee to whom Section 35(2) of the Employment Act applies hence this Court has jurisdiction to hear and determine this matter.

[22] It was also argued for the Respondent that this Court does not have jurisdiction to deal with a prospective claim wherein a litigant claims that the employer failed to fulfill certain contractual obligations. It was submitted that the jurisdiction of this Court and its remedial powers are outlined under Section 8 and 16 of the IRA (as amended) respectively and that these two provisions do not confer upon the Court jurisdiction over claims such as those being sought by the Applicant in this matter. In response, the Applicant maintained that his claim was not a prospective claim but simply a claim for the equivalent of the salary he would have earned during the subsistence of the contract had the Respondent lived to its bargain and called him to work.

[23] Coming to the merits the Respondent opposes the application on the basis that the parties entered into a binding agreement in terms of which the services of the Applicant would be required on an ad hoc basis, only where operational requirement necessitated. In this regard Respondent argues that Applicant agreed to those terms and therefore the contract is binding to the parties.

[24] Giving an account as to why the Applicant was made to sign a contract to render services and ultimately he was not called even once during the subsistence of the ten (10) months fixed contract, it was submitted for the

Respondent that consequent to the conclusion of the agreement with the Applicant, the Respondent experienced an economic meltdown which resulted in a contraction in production volumes due to low demand of certain products. The down turn according to the Respondent was inter alia, as a result of the advent of the COVID-19 pandemic. It was submitted further that the down turn and the pandemic resulted in a drop of the Respondent's business demand. The decline in demand according to the Respondent meant that there was shrinkage in the operations of the Respondent.

[25] Consequently, the Respondent asserts that there was therefore a decline for a need to engage employees who had been retained and/or engaged on an ad hoc basis hence the Applicant during the subsistence of the fixed term contract was therefore not called to render any services as his services were no longer required or necessary.

[26] Moreover, Respondent also contents that in any event the nature of the contract concluded between the parties did not preclude the Applicant from obtaining employment elsewhere. It provided that he would be required to work on ad hoc - as required basis. According to the Respondent this implies that in the event there were no operational demands for his services, the Applicant would not be required to render any service to the Respondent.

[27] It was conceded for the Respondent that Applicant's letter of demand dated 30 October 2019 was received by the Human Resource Officer (being the

Deponent to the Answering Affidavit in these proceedings). The Deponent avers that he orally explained to the Applicant that there had been a contraction in production volumes and that he was not precluded from obtaining employment elsewhere, let alone that Applicant according to the Respondent had always been aware that the contract between the parties was non-restrictive.

[28] On this basis, it was argued for the Respondent that Applicant cannot seek to recover the value of his contract from the Respondent, firstly, because the contract did not preclude him from seeking employment or job opportunities elsewhere. Secondly, because the down turn in production levels which was experienced by the Respondent during the subsistence of this contract was not of the Respondent's own making but it was something beyond its control. In the end, Respondent prayed for the dismissal of the application for lack of merit.

[29] The Applicant on the other hand maintained that the Respondent did not communicate to him be it in writing or verbally anything in connection with the alleged contraction in production volumes, despite that he sent a letter of demand to them. He avers that he had always been waiting to be called to render services hence he placed his services at the disposal of the Respondent. He stated that the first time Respondent offered an explanation was in Court papers in these proceedings.

[30] The Applicant vigorously disputes the assertion by the Respondent that the alleged contraction in production volume was caused inter alia by the

advent of COVID-19. It was submitted for the Applicant that COVID-19 is a phenomenon which came into being in this country in the year 2020 and it was not in there 2019. Applicant avers that this is clear proof that Respondent is clutching on straws to avoid telling the truth.

[31] It was contended for the Applicant that in fact Respondent has produced no evidence at all in support of the alleged contraction in production volumes which resulted in the alleged low demand of certain products. According to the Applicant this goes to show that there was no such contraction in production volumes.

[32] In support of its contention that the Applicant has failed to demonstrate that he is an employee to whom Section 35 (2) of the EA applies and that Section 35 (1) (d) of the EA does not apply to an employee engaged for fixed term and whose term of engagement has expired, the Respondent relied on the authorities *inter alia*: ***Swaziland Meat Industries vs Mduduzi Nhlabatsi and 9 others***[1]***, Nkosinathi Dlamini vs Tiger Security (Pty) Limited***[2] ***and Stephen Mazibuko vs Eagles Nest (Pty) Ltd***[3] to mention just a few, in which the Courts held that an employee engaged for a fixed term and whose term of engagement had expired were not employees to whom Section 35 of the EA applies, and as such have no recourse to Section 35 of the Act.

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[1] SZICA Case No.142/2005
[2] SZIC Case No. 287/2001
[3] SZIC Case No.225/2001

Analysis of arguments and ruling

[33] The Applicant's case is that he was an employee of the Respondent and to whom Section 35 of the Employment Act of 1980(as amended) applied. He has approached the Court for an order directing the Respondent to pay him his salary for the duration of his fixed term contract amounting to the sum of **E41 472.00 (Forty One Thousand Four Hundred and Seventy Two Emalangeni Only).**

[34] Applicants' claim and/or contention is disputed by the Respondent who asserts that the Applicant is not an employee who is entitled to the protection of Section 35(2) of the EA on the basis that he has failed to demonstrate that he worked for more than 21 hours per week and that he was engaged on a fixed term contract whose term of engagement had expired at the time this application as required by the provisions of Section 35 (1) (b) and (d) of the EA of 1980 (as amended).

[35] It is common cause that:

35.1 Applicant concluded a fixed term contract of employment with the Respondent with effect from 1 February 2019 until 30 November 2019 (10 months period);

35.2 Applicant was to work on an ad hoc basis as and when there was an operational need;

35.3 That the terms of the contract were to be applicable only in cases or instances where the Applicant had been called to work;

35.4 The contract required the Applicant to work a 48 hour week or as otherwise agreed with his Manager, and

35.5 The Applicant was to receive an hourly rate of E24.12 per hour which would translate to E2 304.00 in a fortnight and E4 604.00 per month and paid by direct deposit into a bank account of his choice.

35.6 The terms and conditions of the Applicant's employment were reduced into writing.

[36] Section 35 of the Employment Act of 1980, in part, provides as follows:-

Employee's services not to be unfairly terminated

35 (1) This Section shall not apply to -

(a) *An employee who has not completed the period of probationary period provided for in Section 32;*

(b) *An employee whose contract of employment requires him to work less than 21 hours each week;* (Our emphasis)

(c) *An employee who is a member of the immediate family of the employer;*

(d) *An employee engaged for a fixed term and whose term of engagement has expired.* (Our emphasis)

35 (2) No employee shall terminate the services of an employee unfairly.

[37] The Applicant in his argument contends that not only did he have a contract of employment with the Respondent which made him an employee to whom the provisions of Section 35 (2) of the EA applies but he also placed his services at the disposal of the Respondent for ten(10) months even though he was not called to render his services for the full duration of the contract.

[38] He argued that having been contracted for ten (10) months albeit on ad hoc basis he is entitled to the protection of Section 35(2) of the EA particularly because he placed his labour at the disposal of the Respondent who for reasons known to it, did not enroll him to work. According to the Applicant at common law an employee in a contract of employment commits a breach if he reneges on his duty of placing his personal service at the disposal of the employer. Likewise, the employer on the other hand breaches the contract of employment if he reneges on his undertaking to pay the salary or wages agreed in consideration for the service rendered. In regard reference was made to the case of ***Wyeth SA (Pty) Ltd vs Manqele T and 3 Others***.[4]

[39] Section 2 of the IRA of 2000 (as amended) defines an employee as a person whether or not the person is an employee at common law, who works for pay or other remuneration under a contract of service or under

[4] Labour Appeal Court of South Africa Case No. JA50/2003

any other arrangement involving control by or sustained dependence for the provision of work upon one another. Section 2 of the EA defines an employee as any person to whom wages are paid or are payable under a contract of employment.

[40] It is not in dispute that the Applicant concluded a fixed term contract of employment with the Respondent with effect from 1 February 2019 until 30 November 2019 and Applicant was to work on ad hoc basis as and when there was an operational need. It is also common cause that Applicant was never called to work for the duration of the whole contract until it expired.

[41] The contract of employment was signed by the parties and specifically the Applicant on 1 February 2019 marking his acceptance of the offer of employment made by the Respondent. Explaining when does a contract of employment come into existence **Justice Mazibuko** in the case of ***Goodmen Dlamini vs Financial Service Regulatory Authority***[5] held that:

> *A contract of employment came into existence the day the employee/Applicant communicated to the Respondent his acceptance of the offer. Once an offer is accepted a contract comes into existence and once a contract is concluded it is no longer open to the Respondent /employer to withdraw the offer.*

[5] (229/2015)SZIC 20 (2017)

[42] So the contention on behalf of the Respondent that the Applicant is not an employee to whom the provision of Section 35 (2) of the EA apply because he did not render any service to the Respondent as a result of which he did not meet the minimum threshold of 21 hours per week as required by Section 35 (1) (b) of the EA is in the Court's view unsustainable.

[43] This is so because not only had the Applicant concluded a contract of employment with the Respondent, but the same contract at Clause 4 expressly stated that he was required to work for 48 hours per week or as otherwise agreed with the Manager notwithstanding that he had been contracted to work on ad hoc basis. Put differently, the Court's understanding of Clause 4 of the contract is that from the onset and notwithstanding that the Respondent intended to engage the Applicant on ad hoc basis; it nevertheless still anticipated that he would be required to work at least 48 hours per week unless agreed otherwise with the Manager.

[44] In our view, the phrase 'or as otherwise agreed with your Manager' may imply either 48 hrs or in excess of 48 hours per week or if less than 48 hours but not necessarily less than 21 hours. Therefore, in our view in the context of Clause 4 of the contract between the parties nothing can be read which implies that Applicant would have worked for anything less than 48 weeks. So whether or not Applicant rendered any service to the Respondent during the tenure of the fixed term contract, nothing on the facts and the papers before court suggests that it was due to his own fault. On this basis it is our finding that Section 35 (1) (b) of the EA is not applicable to the Applicant.

[45] The Respondent's second contention is that Applicant has failed to demonstrate that he is an employee entitled to the protection of Section 35 (2) of the EA because he was engaged for a fixed term and his contract expired on 30 November 2019. It was argued therefore that Section 35 does not apply to the Applicant and consequently this Court lacks the jurisdiction to hear and determine this matter.

[46] At paragraph 5 of its Answering Affidavit, the Respondent states in part as follows:

> *"5. In terms of Section 35 (1) (d) and (e) (sic) of the Employment Act, the Honourable Court does not have jurisdiction* ***to deal with a claim arising out of a termination of a contract*** *that has lapsed by effluxion of time...."* (Underlining is our emphasis)

[47] At paragraph 21 of its Heads of Argument it is submitted for the Respondent thus:

> *"21.* ***In order to succeed in any claim of unfair termination****, an employee must demonstrate that he is an employee to whom Section 35 of the Employment Act applies as part of our law. It then excludes categories of employees who are not eligible or entitled* ***to pursue claims for unfair termination****."* (Underlining is our own emphasis)

[48] Again at paragraph 22 of the Respondent Heads of Argument, it is submitted as follows:

"22. .....***The Applicant's complaint is that his services were unlawfully terminated*** *after the expiry of the contract in that during the subsistence of the contract he was not called to render any service for the Respondent.*" (Underlining is our emphasis)

[49] Once again at paragraph 24 of the Respondents Heads of Argument it was submitted in part that:

"23....The Applicant was employed on a fixed term contract which has expired and ***accordingly has no right to claim unfair termination****."*(Emphasis added)

[50] On behalf of the Respondent in support of the sacrosanct position of the law within our jurisprudence in the context of Section35 (1) (d) of the EA, reliance was had to the case of ***Swaziland Meat Industries vs Mduduzi Nhlabatsi and 9 Others, Nkosinathi Dlamini vs Tiger Security (Pty) Ltd and Mazibuko vs Eagles Nest (Pty) Ltd***[6] which all reiterate and upheld the principle that where any employee is engaged on a fixed term contract of employment and that contract has expired, the employee does not have a right to claim unfair termination.

[51] Section 35 of the EA is headed '*Employee's services not to be unfairly terminated'*, which means that it is concerned with unfair termination of employees services. Moreover, in all the three (3) authorities cited above the claims of all the respective three (3) Applicant who were excluded

[6] See (n1,n2and n3) above respectively

from the protection of Section 35 (2) of the EA owing to the provisions of Section 35 (1) (d) of the EA, pertained to allegations of unfair termination of their services and had they succeeded their remedies would have lied within the remedial powers of this Court as provided for under Section 16 of the IRA of 2000 (as amended).

[52] With respect, all these authorities are distinguishable from the present case. The only common feature between these three cases and the present case is that all the Applicants had been engaged either on fixed term contract or as casual employees and in all cases the tenure of their employment had since expired.

[53] The distinguishing factor comes in the sense that all the Applicants in the three cases cited above on behalf of the Respondent had claimed for unfair termination of their employment services in the context of expired fixed term contracts or casual labour arrangements. In the ***Swaziland Meat Industries*** case the Applicant was claiming for the payment of compensation. In the ***Nkosinathi Dlamini*** case, Applicant claim was maximum compensation for unfair dismissal and in the **Stephen Mazibuko**'s case the Applicant's claim was for reinstatement (with arrear salary) or maximum compensation for unfair dismissal in the alternative. As stated earlier, in all three cases, the Applicant's fixed term contracts had expired and they had not worked continuously for more than three months hence the respective Courts correctly found that they were not employees to whom the provisions of Section 35 (2) of the EA applied.

[54] In the present case, the Applicant's claim is not for unfair termination of his contract or services. Instead, he is claiming to be paid the equivalent of what he would have been paid had the Respondent called him to work on an ad hoc basis as agreed during the subsistence of his ten (10) month fixed term contract. This is not a claim for unfair termination of his contract, neither is it one for reinstatement nor for payment of other terminal benefits such as severance pay, additional notice, etc. In our view this therefore makes the present case distinguishable from the authorities relied upon by the Respondent as cited above.

[55] Moreover, Applicant has demonstrated that he began pursuing his present claim against the Respondent prior to the expiry of the fixed term contract he had with the Respondent. Firstly, he wrote to the Respondent in October 2019 when his contract was coming to an end on 30 November 2019. Secondly and after receiving no response from the Respondent on 14 November 2019 (again this being before the expiry of his contract) he reported a dispute at CMAC. In other words, the Applicant took other steps to pursue his claim prior to this application before Court. In essence Applicant has complied with the requirements of Part VIII of the Industrial Relation Act. It is therefore our finding that the Applicant is an employee to whom Section 35 (2) of the Employment Act applies.

[56] In any case, this Court has jurisdiction under Section 8 (1) of the Industrial Relations Act of 2000 (as amended) to hear, determine and grant the relief sought by the Applicant in this matter; provided of course that a solid case has been established. In this regard Section 8(1) of the Act provides that:

"8 (1) The Court shall subject of 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 Employment Act, the Workmen's Compensation Act, or any other legislation which extends 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*****....."**(Underlining is our emphasis).

[57] So in line with Section 8(1) of the IRA this Court enjoys exclusive jurisdiction to hear, determine and grant any appropriate relief in respect of any matter which may arise at common law between an employer and an employee in the course of employment as is the case in this present matter. The Applicant's claim emanates out of a common law employer and employees relationship.

[58] This position was reaffirmed by Her Lordship Justice M. Dlamin J. in her judgement in the matter of ***Vusumuzi Cornelius Shongwe vs Principal Secretary-Ministry of Public Works and Transport and 2 Others***[7] where at paragraph 28 of the judgement she made the following observation:

"....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 9 2000, the jurisdiction can be sourced beyond legislation.

[7] (1344/06)(2020) SZHC59

Common law strictu sensu is also a source for the Industrial Court's jurisdiction."

[59] In a recent judgement His Lordship Mlangeni J. in the matter of ***Myengwa Macuba Sibandze vs National Football Association of Eswatini and 3 Others***[8] reinforced the position of the law when the court held that the Industrial Relation Act of 2000 (as amended) extended the jurisdiction of the Industrial Court to claims arising at common law on matters arising out of an employer and employee relationship.

[60] This Court also finds that Applicant's claim is not a prospective claim as it is not a claim based on the happening of a future event.

[61] The Court also makes an observation that the Applicant complied with the requirements of Part VIII of the Industrial Relations Act to the extent that he even obtained a certificate of unresolved dispute, he nevertheless chose to approach this Court by means of a Notice of Motion and Founding Affidavit in terms of Rule 14 of the Industrial Court Rules of 2007 as opposed to doing so by way of an Application for the Determination of an Unresolved Dispute accompanied by a Statement of Claim as envisaged under Rule 7 of the Rules of this Court.

[62] This observation is relevant and significant in the sense that owing to the nature of the Applicant's fixed term contract with the Respondent, that is , it being on ad hoc basis, it would be impossible to determine and/or

[8] (1092/20) [2020] SZHC (211) 16th October 2020

compute Applicant's claim if any, in the absence of oral or *viva voce* evidence.

Conclusion

[63] The Court having already found that it has jurisdiction over this matter, the Court is of the firm view that the averments made in the Applicant's Founding Affidavit and Replication sufficiently establish his cause of action to which the Respondent has sufficiently provided a Reply and/or defence on the merits. In the circumstances, and in the interest of justice to all the parties (this being a Court of equity); in the exercise of its discretion as vested under Rule 14 13 (b) of the Rules of the Industrial Court of 2007, the Court has deemed it fit and proper to refer this matter to trial and further direct that it be enrolled in the Trial Register immediately after the parties have complied with all the preparatory of trial stages as envisaged in the Rules.

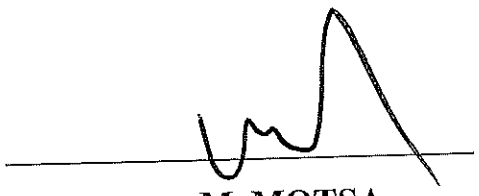
[64] In the premise the Court makes the following Order:

(a) The Respondent's preliminary point of law is hereby dismissed.

(b) The matter is referred to trial in accordance with Rule 14 (13) (b) of the Rules of the Industrial Court and the Registrar is directed to enrol the matter in the Trial Register immediately after the parties have complied with all the preparatory of trial stages, all which must be finalized within twenty-one (21) days from the of delivery of this judgement.

(c) Each party to pay its own costs.

The Members agree.



M. MOTSA

JUDGE OF THE INDUSTRIAL COURT OF ESWATINI

FOR APPLICANT: Mr V. Magagula

FOR RESPONDENT: Mr E. N. Shabangu
(Robinson Bertram)