

IN THE SUPREME COURT OF SWAZILAND

HELD AT MBABANE

APPEAL CASE NO. 44/2008

In the matter between:

THE COMMISSIONER OF LABOUR N.O.
SANDILE MLAMBO
THE ATTORNEY GENERAL

1ST APPELLANT
2ND APPELLANT
3RD APPELLANT

and

SWAZILAND DEVELOPMENT
FINANCE CORPORATION

RESPONDENT

CORAM

RAMODIBEDI, JA FOXCROFT, JA
MAPHALALA, AJA

FOR APPELLANT FOR
RESPONDENT

MR. M. VILAKATI MR. M.
SIBANDZE

HEARD DELIVERED

11 MAY 2009 21 MAY 2009

JUDGMENT

FOXCROFT, JA

[1] The respondent brought a successful application in the High Court to compel first appellant, the Commissioner of Labour to comply with a provision of the Workmen's Compensation Act, No. 7 of 1983. The order of the High Court was that:

"The Labour Commissioner is hereby compelled to comply with section 14 (3) of the Workmen's Compensation Act 1983 and refer the matter for assessment to the Workmen's Compensation Medical Board."

The Commissioner was also ordered to pay the costs of the application.

[2] The Commissioner noted an appeal against this order on the sole ground that the High Court "erred in law and misdirected itself in concluding that the High Court has jurisdiction to hear the matter."

It was submitted by Mr. Vilakati who appeared for the first and third appellants that the High Court had no jurisdiction to hear the application before it since the relief sought fell within the exclusive jurisdiction of the Industrial Court. This had been raised as a point *in limine* in the High Court, and we were informed from the Bar that the High Court had ruled on the point *in limine* alone. The merits of the matter had not been argued. Mr. Vilakati submitted that it was still

open to the respondent (which I shall call "FINCORP") to seek relief in the Industrial Court since that was the proper forum to apply for the desired relief.

[3] Mr. Sibandze, who appeared for the respondent on appeal, countered this submission with the broad contention that section 8 (1) of the Industrial Relations Act 2000, as amended, is concerned with disputes between employer and employee. His main submission was that the present dispute is not one between employer

and employee but between FINCORP and the Commissioner.

It is necessary to examine the facts which led to the order granted in the High Court. FINCORP employed Mr. Sandile Mlambo (now second appellant) and cited him as an interested party in the High Court application. That he certainly was, but the dispute which arose did not constitute one between him and his employer. What had happened was that after the second appellant had been injured in a motor accident, he had reported the accident to the Commissioner who then transmitted to FINCORP a form in terms of section 13 of the Workmen's Compensation Act containing a draft agreement proposing that FINCORP agree that its employee had suffered 60% permanent disability and that it should pay him the sum of E350,646.41.

FINCORP did not accept the figure suggested by the Commissioner and replied requesting that the assessment be sent to the Workmen's Compensation Medical Board in terms of section 14 (1) as read with section 14 (3) of the Workmen's Compensation Act. The response from the Commissioner was that the "time frame for forwarding the appeal to the Medical Board as per section 14 (1) of the ... Act was time barred." This in turn drew an immediate reply from FINCORP's attorney who correctly pointed out that no appeal in terms of section 14 (1) had been filed. What had been filed was an application for determination and assessment of the claim. The annexures to the founding affidavit detail these events and the stances of the respective parties.

The Commissioner opposed the application raising the point *in limine* to which reference has already been made, and which was the only issue determined in the court *a quo*. On appeal before this Court, Mr. Vilakati urged an interpretation of section 8 (1) of the Industrial Relations Act which excluded the jurisdiction of the High Court. He submitted that the application before this

Court was one "in respect of ... the provisions of ... the Workmen's Compensation Act" (to use the words of section 8 (1)

and therefore fell within the "exclusive jurisdiction of the Industrial Court".

This reading ignores the rest of section 8 (1) of the Industrial Relations Act which continues to afford exclusive jurisdiction to the Industrial 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 employers' 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.

The subsection which is not clearly worded provides for "an application, claim or complaint or infringement of any of the provisions of certain specified statutes to be heard by the Industrial Court. The subsection then proceeds to list further categories where the Industrial Court is seised of exclusive jurisdiction. These are:

- (i) in respect of matters which may arise at common law between an employer and employee in the course of employment
- (ii) matters between an employers' association and a trade union or staff association

- (iii) matters between an employees' association, trade union, staff association or federation and a member of any such association.

Mr. Sibandze submitted that the subsection provides for disputes between employer and employee, employers' associations and trade unions, and between an employees' association and a member thereof to be determined by the Industrial Court. He submitted further that the opening words of the subsection should be interpreted to cover an application relating to a specified statute where such application or complaint arose as a result of a dispute between employer and employee.

Reading subsection 8 (i) as a whole it seems to me that the Industrial Court was intended to be given exclusive jurisdiction in matters whether arising from statutory provisions or from the common law, between employer and employee. It would make little sense in an unbroken subsection to provide for disputes between employer and employee which arise at common law to be heard only in the Industrial Court, while providing in the opening provisions of the subsection that any application pertaining to a provision of the listed statutes may be brought regardless of the employer/employee relationship.

As Mr. Sibandze also pointed out, the application brought in the High Court was not one alleging that the Commissioner had

contravened the provisions of an Act, but that he had simply refused to submit the matter for assessment and had accordingly failed to act. He submitted that the High Court was vested with the jurisdiction to hear FINCORP's case since what was sought was an order compelling the Commissioner to exercise his statutory function so that the matter could properly proceed for determination. A mandatory interdict was therefore sought and obtained.

Again, I regard this submission as correct.

This view is not inconsistent with the decision of this Court in **Swaziland Breweries Limited and Sicelo Mabuza v Constantine Ginindza**, Civil Appeal No. 33/2006, as yet unreported. In that matter the respondent was dismissed from his employment by the second appellant after disciplinary proceedings for misconduct in the course of his employment. He launched an application in the High Court reviewing and setting aside the termination of his employment. This Court held, after reviewing the history of industrial relations in this country, the repeal of the 1980 Industrial Relations Act in 1996, and further repeal in 2000 when the present Act appeared on the statute book, that the effect of various changes in the legislation was to make it plain that exclusive jurisdiction was indeed intended to

be vested in the Industrial Court in respect of matters provided for under subsection 8 (1) of the Act.

It is clear that that decision was concerned with an employer/employee dispute. The Court did not interpret the section any further than was necessary since it was clear that the employee should have taken his dispute with his employer to the Industrial Court.

This is not the position in the present matter where the employee has laid no complaint against his employer. The application brought against the Commissioner by the employer (FINCORP) is simply not provided for in section 8 (1) of the Act and the jurisdiction of the High Court to grant a mandatory interdict was not excluded.

Mr. Vilakati submitted that his argument was supported by the decision of this Court in **Delisile Simelane v. The Teaching Service Commission and the Attorney General** Civil Appeal Case No. 22/2006 particularly at p. 9 of the judgment of Zietsman, JA. The learned judge of appeal was there concerned only with the portion of the subsection 8 (1) which dealt specifically with a "matter which may arise at common law between an employer and an employee in the course of employment". Since that was the position on the facts and the law relating thereto, the exclusive jurisdiction of the Industrial

Court was clearly established. The decision does not assist in the present appeal.

Mr. Vilakati also referred to section 20 (1) of the Workmen's Compensation Act submitting that the Industrial Court has exclusive power to deal with

"any question to be investigated or determined under the Act".

Mr. Sibandze's response, which was correct in my view, was that the respondent, FINCORP, does not have any question to be investigated and/or determined under section 20 of the Workmen's Compensation Act but "seeks to have the 1st appellant perform his statutory duty as provided in section 14 (3) of the Workmen's Compensation Act".

[11] I have accordingly reached the conclusion that the jurisdiction of the High Court was not excluded on the facts of this matter. The dispute was not one within the purview of section 8 (1) of the Industrial Relations Act, 2000, as amended, and the order of the court a quo in dismissing the jurisdictional point *in limine* was therefore correct.

The appeal is dismissed with costs.

J.G. FOXCROFT

JUDGE OF APPEAL

I Agree

M.M. RAMODIBEDI

JUDGE OF APPEAL

I Agree

S.B. MAPHALALA

ACTING JUSTICE OF APPEAL