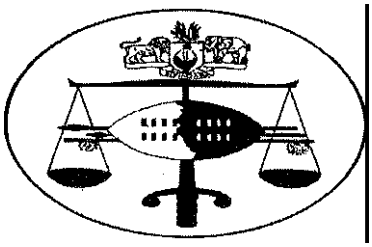

IN THE SUPREME COURT OF ESWATINI

JUDGMENT

Civil Appeal Case 77/20

In the matter between:

MYENGWA MACUBA SIBANDZE **Appellant**

And

NATIONA FOOTBALL ASSOCIATION OF ESWATINI **Respondent**

Neutral citation: *Myengwa Macuba Sibandze vs National Football Association of Eswatini (77/2020) [SZSC] 41[2021] (25th November, 2021)*

Coram: **S.B. MAPHALALA JA**
JCURRIEAJA
M. MANZINIAJA

Heard: **16th September, 2021**

Delivered: **26th November, 2021**

Summary: *Law of delict -Appellant claimed consequential damages before the court a quo - Respondent in the court a quo raised a special plea that the High Court had no jurisdiction - section 151(3) (b) of the Constitution - section*

8(1) oj the Industrial Relation Act of 2000 considered - Appeal Court confirms the judgment of the court a quo - with costs.

JUDGMENT

S.B. MAPHALALA JA

Introduction

[1] Before this Court is an appeal against the judgment of the court *a quo* per His Lordship Mlangeni J handed down on the 16th October, 2020 on the following grounds:

1. The court *a quo* erred **in** law and in fact when adopting a rather simplistic and literalist approach in interpreting section 8(1) of the Industrial Relations Act 2000 and in the process the court *a quo* failing to take into account that the exclusivity of the jurisdiction of the Industrial Court is limited to matters and/ or issues referred to in the Act itself more particularly the very section 8(1) of the Act.

2. The court *a quo* erred in law by ignoring a judgment of the Supreme Court of Eswatini, by which the court *a quo* is bound, dealing with the limitation of the exclusivity of the jurisdiction of the Industrial Court per section 81(1) of the Industrial Relations Act 2000.

3. The court *a quo* erred in law and in fact by concluding that and as a basis for its judgment that the Appellant's claim arose from an employer-employee relationship when the facts before it showed that the Appellant's claim was based on consequential damages which

necessarily had not directly arisen from an employer-employee relationship although having its genesis therein.

4. The court *a quo* erred in law and in fact by holding that Appe!lant's claim arises at common law between an employer and employee in the course of employment when in actual fact the claim before the court is one not arising in the strict sense from such an employer-employee relationship as envisaged in the Industrial Relations Act.

[2] A brief background of the matter is outlined by Counsel for the Respondent in his Heads of Arguments in paragraph 2 thereof to be the following:

> The Appellant was employed by the Respondent in terms of a fixed-term contract for an initial period of two (2) years, with effect from the l st of August 2000 until July 2002. The employment contract was signed by the parties on the 27th of November 2000. When the contract of employment came to an end on the 30th of July 2002, the Appellant remained in continuous employment with the Respondent until his dismissal by a letter dated 3rd of March, 2006.
>
> 2.1 The Appellant did not accept the dismissal and he reported the matter to the Conciliation Mediation and Arbitration Commission (CMAC) as a dispute in the year 2006. The dispute could not be resolved and a Certificate of Unresolved Dispute was accordingly issued by the Commission. Thereafter, the Appellant instituted the matter of dismissal at the Industrial Court claiming that it was both substantively and procedurally unfair.
>
> 2.2 On the 14th October 2016, the Industrial Court upheld with costs the Appellant's claim and he was granted compensation for unfair dismissal in the amount of ES00,000.00 (Five Hundred Thousand

Emalangeni). The above Honourable Court is referred to pages 9 to 33 **of the Record of Appeal.**

[3] The Appellant in the court *a quo* had filed a Combined Summons action dated the 11th June 2020 seeking the following claims:

(a) As against the Defend3cnts jointly and severally the one paying the others to be absolved, payment of the amount of El0,000.00 (Ten Million Emalangeni) plus interest thereon at the rate of nine percent (9%) per annum calculated from date of issue of summons;

(b) Costs of suit as against the Defendants jointly and severally one paying the other to be absolved; and

(c) Further and / or alternatively relief.

The defence

[4] Subsequently thereto, the Defendants duly filed their Notice oflntention to Defend and further filed their Special Plea based on *res judicata,* jurisdiction and mis joinder.

[5] The Appellant then filed the appeal as stated above in paragraph [1] on this judgment. On the day of hearing of the appeal the Appellant appeared in person and when asked if he was representing himself, he stated that he will conduct his own cal>e, The Court allowed him tp represent himself in this matter. The Respondent was represented by Mr Mdladla.

[6] Both parties filed applications for condonation for the late filing of Heads of Arguments. After hearing the various arguments to and fro regarding this aspect of

the matter we came to the considered view in the interest, of justice, that the Court should allow the parties to proceed with arguments on the merits of the dispute.

(i) Appellant's arguments

[7] The Appellant contends that the Industrial Court of Eswatini has exclusive jurisdiction of limited operation. The Industrial Court's jurisdictory exclusivity is limited to claims and/ or remedies founded on the statutes outlined in section 8(I) of the Industrial Relations Act 1/200 (IRA). Neither is the cause of action in *casu* **"any. matter which has arisen at common law"** between Defendant as employer and Appellant as an employee. ·

[8] Rather, the High Court of Eswatini, has unlimited jurisdiction in civil matters in terms of section 151 (1) of the Constitution Act 1/2005, subject of course, to the exception outlined in sub-section 3 (a) of the very section 151. It is submitted that the exclusivity of the jurisdiction of the Industrial Court cannot operate outside the parameters provided by the statute being the IRA.

[9] That the relief claimed in *casu* has nothing to do with any of the statutes referred to in section 8(1) of the Act. Neither, as aforesaid, is a "matter arising at common law between an employer and employee in the course of employment. The claim therefore does not lie within the jurisdiction of the Industrial Court. Consequently the Industrial Court has no jurisdiction to deal with the matter and only the High Court has such jurisdiction.

[10] It is contended further by the Appellant that he was dismissed on the 3 March, 2006. From that date he ceased being an employee of the 1st Respondent. The fuel that the termination of contract of employment was adjudicated upon by the Industrial Court does not prescribe that this case must dealt with in the Industrial Court as

well. That in this case is the direct consequence of the breach that is in issue rather than the breach itself.

[11] Furthermore, Appellant contends that everyone has a right to insist upon compensation if their rights have been infringed and this arises from the general law, being the common law applicable in Eswatini.

[12] The Appellant cited a plethora of decided cases in this country and in South Africa in support of his arguments. In this regard he cited the appeal case of **Swaziland Federation or Trade Union** & **3 Others vs Chairman, Constitutional Review Commission** & 7 **Others, High Court case no. 3367/2004** and that of **Edward Mbuyiselo Makhanya vs The University of Zululand 9218/08) [2009] ZASCA 69 per Nuggent JA** to the following dictum:

> " *....but where a person has two separate claims each for enforcement of a different right, the position is altogether different, because then both claims will be capable of being pursued, simultaneously or sequentially, either both in one court, or each in one of those court.* "

(ii) Respondent's arguments

[13] Counsel for the Respondent advanced arguments directed at each ground of appeal as stated at paragraph [I] of this judgment and concluded in paragraph 8 of his Heads of Argument by stating that the Appellant's claim is based on the jurisdiction of the Republic of South Africa, a status *quo* which does not prevail in this nation's juri;,diction.

[14] On tlie first ground of whether the court *a quo* erred in law and in fact when adopting a rather simplistic and literalist approach interpreting section 8(1) of the Industrial

Relations Act, 2000 and in the process the court *a quo* failed to take into account that the exclusivity of the jurisdiction of the Industrial Court is limited to matters and / or issues referred to in the Act itself more particularly section 8(1). ln a bid to assist this Court to comprehend why the court *a quo* opted to interpret section 8(1) of the Industrial Relations Act 2000 in the manner it did Counsel for the Respondent proceeded to outline the different interpretation theories to be firstly that it is the primary rule of interpretation that if the meaning of the word is clear, it should be put into effect, and indeed equated with the legislative's intention.

[15] Secondly, if the so called **"plain meaning"** of the words is ambiguous vague or misleading or if a strict literal interpretation would result in absurd results, then the court may deviate from the literal meaning to avoid such an absurdity. That this is known as the **"golden rule"** of interpretation. Then the Court will turn to the so called **"secondary aids"** of interpretation to find the intention of the legislative (e.g. the long title of the heading, to chapter and section, the text in the other official language etc).

[16] Thirdly should these **'secondary aids'** to interpretation prove insufficient to ascertain the intention, then the Courts will have recourse to the so-called **'tertiary aids'** to construct (i.e. the common law presumption. (See **Statutory Interpretation, an Introduction for Students, Christo Botha, fourth Edition, Juta & co. Ltd, 2005, page 47 to 48).**

[17] Respondent contends that from the aforementioned description and analysis of the different theories of interpretation, it is clear that the plain meaning approach is one which should be adopted at first instance unless the words are ambiguous, vague or misleading, or if a strict literal interpretation would result in absurd results, then the Court may deviate from the literal meaning to avoid such an absurdity.

[18] Section 8 (1) of the Industrial Relation Act 2000 (as amended) states as follows:

> *"The Court shall, subject to sections 17 and 65 grant any appropriate relief in respect of an application, claim or complaint or infringement of any of the provisions of this, the Employment Act, 200, the Workman's Compensation Act, or any other legislation which extends jurisdiction to the Court, or in re.1vect of any matter which may arise at common law between an Employer and Employee in the course of employment between an employer and Employee's Association and Trade Union, or Staff Association, or between an employee's Association, a Trade union and Staff Association, a Federation and a Member thereof"*

[19] Thc, Respondent further contends that in accordance with the interpretation theories, when the plain meaning theory is applied in the interpretation if the above stated section, there is no absurdity and / or ambiguity arrived at, hence the court *a quo* was correct in applying the plain / literal meaning. In support of this argument Counsel for the Respondent has cited what was stated in the English case of **Corrocraft Ltd V Pan American Airways [1968] 3WLR at page** 732 to the following:

> *"In the performance of this duty, Judges do not act as competitors into which are fed the statute and the Rules for the construction statutes and from which issue forth the mathematically correct answer. The interpretation of statutes is a craft as much as science and Judges as craftsmen, select and apply the appropriate rules as the tools of their trade. They are not legislations, but.finishers, refiners and polishers of legislation which comes to them in state requiring varying degree ,?ffi,rther*
>
> *processing. "*

[20] Furthermore, it contended for the Respondent regarding this ground of appeal that in. light of the aforementioned the learned Judge of the court *a quo* exercised rights

that are incumbent on him by virtue of being a Judge and such right was used in a justifiable manner.

[21] It is the Respondent's further contention on this point that it is worth noting that the above mentioned section was amended in 2000 and the words **"any matter which may arise at common law between an Employer and Employee in the course of employment"** that the addition of these words opened the scope of matters the Industrial Court could preside over. That it is inconceivable that after the addition of these words its scope would still be limited to that only contained in the Act itself prior to the amendment and not common law which is known not to have been committed as was to obtaining circumstances before the Act was amended.

[22] Finally it is contended for the Respondent that the Appellant's claim is based on the jurisprudence of the Republic of South Africa, a *status quo* which does prevail in this nation's jurisprudence.

[23] The Respondent prays that the appeal be dismissed with costs.

The analysis and conclusions

[24] After hearing the arguments of the Appellant and that of the Respondent it is common cause between the parties that the whole appeal revolves around the issue of jurisdiction of the Industrial Court and the Appellant and Defendant's Counsel only dealt with this aspect of the matter. This Court also will decide this matter on the question of jurisdiction.

[25] The Appellant contends that the Industrial Court of Eswatini has exclusive jurisdiction and is of limited operation. The Industrial Court's jurisdiclionary

exclusivity is limited to claims and/ or remedies found on the statute outlined in

section 8(1) of the Industrial Relation Act 1/2000 (IRA) neither is the cause of action in *casu* **"any matter has arisen at common law"** between the Defendant as Employer and Appellant as an Employee. Rather, the High Court of Eswatini has unlimited original jurisdiction in civil matters in terms of section 151 (I) of the Constitution Act 1/2005, subject of course to the exception outlined in sub-section 3(1) of the very section 151 and that the exclusivity of the jurisdiction of the Industrial Court cannot operate outside the parameters provided by the statute being in IRA.

[26] That the relief claimed in *casu* has nothing to do with any of the statute referred to in section 8(1) of the Act. Neither as aforesaid is it a "matter arising at common law" between an Employer and Employee during the course of employment. The claim therefore does not lie within the jurisdiction of the Industrial Court. Consequently, the Industrial Court has no jurisdiction to deal with the matter and only the High Court has such jurisdiction.

[27] On the other hand the Respondent contends otherwise that the Appellant's claim is based on the jurisdiction of the Republic of South African a status *quo* which does not prevail in this nation's jurisprudence.

[28] In my assessment of these competing arguments it is my considered view that the Respondent is correct on this point of jurisdiction.

[29] The Learned Judge in the court *a quo* stated the following at paragraph [8] of his judgment which has been challenged before this Court:

> **"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 purse **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 Maldianya vs The University of Zululand 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".**

[30] I cannot fault what is stated by Learned Judge of the High Court In the circumstances I am in agreement with the arguments of the Respondent on the question of jurisdiction.

[31] In this regard I am in agreement with the ratio by the learned Judge of the court *a quo* that Appellant whose rights arise exclusively from an employer and employee relationship, has approached the High Court in what he perceives to be his rights in common law, being a claim for consequential damages of 10 Million EmalangenL Th.e High Court therefore cannot entertain a suit like that in our constitutional framework.

[32] The provisions of section 151(3) (a) which the Appellant relies on are clear and without question the High Court has no original or appellate jurisdiction m any matter in which the Industrial Court has exclusive jurisdiction.

[33] It is also clear that the jurisdiction of the Industrial Court is explicitly established by section 8(1) of the Industrial Relations Act (as amended) as outlined at paragraph
[18] of this judgment

[34) Furthermore I am in agreement with the Respondent's Counsel in paragraph 4.5 of his heads of Arguments that it is worth noting that section 8(1) of the Industrial Relation Aet (as amended) was amended in 2000 and the words **"any matter which arise at common law between an employer and employee in the course of employment"** added. That the addition of these words opened the scope of matters the Industrial Court could preside over. That it is inconceivable that after the addition of these words, the scope would still be limited to that only contained in the Act itself prior to the amendment and not common law which is known not to have been codified as was the situation before the Act was amended.

[35) Finally, it appears to me that the Respondent is correct that the Appellant's claim is mistaken based on the jurisdiction of the Republic of South Africa, a *status quo* which does not prevail in this nation's jurisprudence.

[36) In the result, for the aforgoing reasons the appeal is dismissed with costs.

S.B. MAPHALALA JA

I ALSO AGREE

M. MANZINI AJA

Appellant in person

For the Respondent: Mr. H Mdladla
(S.V. Mdladla & Associates)