IN THE SUPREME COURT OF ESWATINI

JUDGMENT

Civil Appeal Case: 66/2021

In the matter between:

URSULLA LILLY SHONGWE **Appellant**

And

MCB LABORATORY SOLUTIONS (PTY) LTD **Respondent**

Neutral citation: Ursulla Lilly Shongwe vs MCB Laboratory Solutions (Pty) Ltd (66/2021) *[SZSC] 61 [2022]* (1st December *2022)*

Coram: **S.B MAPHALALA JA**
S.J. MATSEBULA JA
N.J. HLOPHE JA

Heard: **8th June, 2022**

Delivered: **1st December 2022**

Summary: *Civil appeal – special plea – Appellant had resigned - Appellant advances a claim under the Industrial Relations Act, as amended - Claims accrues from employer – employee relationship – Held that the court a quo was*

correct to uphold the special plea advanced by the Defendant in the court a quo – Consequently, this court on appeal finds that Appellant had resigned and therefore her claim can only arise at common law – the appeal is dismissed with costs.

JUDGMENT

S.B. MAPHALALA JA

Introduction

[1] Before court is an appeal of an order made in the High Court ("the court *a quo*") on the 14th October , 2021 by His Lordship Mr. Z Magagula, in which the court *a quo* dismissed the Appellant's special plea that the High Court had no jurisdiction on the claim of the Appellant for payment of monies advanced to the Appellant by the Respondent.

[2] The present appeal is a very narrow one as it pertains to the question of whether or not the High Court had jurisdiction to deal with the **lis** between the parties.

[3] The court a quo held that the dispute was not one provided for in labour legislation to be decided by the Industrial Court, as a specialist court.

[4] The Appellant noted an appeal on or about 26th October, 2022. In essence it appears there is only one ground of appeal in that the court *a quo* erred to hold that the High Court has jurisdiction on the matter in which the Industrial Court has exclusive jurisdiction.

Background facts

[5] A summary of the facts are as follows:-

5. The Respondent instituted action proceedings against the Appellant for the payment of the balance of monies that was advanced to the latter whilst still employed by the Respondent. The Appellant defended the matter and the Respondent applied for summary judgment. The Respondent abandoned the application for summary judgment when the Appellant filed her affidavit resisting summary judgment. The Respondent consented to the Appellant being granted leave to defend the matter.

6. In paragraph 2 of its declaration the Respondent pleaded that *"the above Honourable Court has jurisdiction to hear and determine this matter as the cause of action arose within its jurisdiction area"*. In her plea, the Appellant did not take an issue with the jurisdiction of the court a quo and she pleaded that *"the contents herein are noted and are not in issue"*.

7. The trial proceeded in the court *a quo* and one witness for the Respondent was led in evidence. When it was time for the Appellant to cross examine the witness she then raised a special plea of lack of jurisdiction by the High Court to hear the matter. The argument of the Appellant was that the Industrial Court had exclusive jurisdiction to entertain the claim as it arose from an employment relationship.

Appellant's arguments

[6] The Appellant contends that the dispute arises out of an employer – employee relationship thus it is governed by the Industrial Relation Act, 2000 as amended

and exclusively falls within the domain of the Industrial court as provided for in section 8(1) of the Act which provides as follows:

> ***"The court shall ...have exclusive jurisdiction to hear, determine and grant any appropriate relied in respect of an application, claim or complaint ... in respect of any matter which may arise at common law between an employer and an employee in the course of employment..."***

[7] In support of its claim, and in its declaration, the Appellant (who is Plaintiff in the court *a quo) inter alia* alleges at paragraph 4 (page 6 of the Record) of its Declaration that *"at all material times thereto, there existed an employer – employee relationship between the parties."*

[8] The Appellant proceeds to state at paragraph 5.2 (page 6 of the Record) of its Declaration that the Plaintiff agreed to loan the Defendant the capital sum as aforesaid and *for that purpose as its employee.*

[9] At paragraph 5.4 (page 6 of the record) of the Declaration the Plaintiff alleges that it was in event *Defendant "resigned her employment (that) the full amount owed would be due owing and payable".*

[10] At paragraph 7 (page 7 of the record) of the declaration the Plaintiff continued to say that "*in breach of the agreement the Defendant resigned her employment with the Plaintiff leaving a balance of .....*" (This averment proved to be the death knell to Appellant case as found by the court *a quo*).

[11] The Appellant persists that there was relationship between employer and employee regardless of what is stated in the Declaration.

[12] In support of its case Appellant cited a number of decided cases in our jurisdiction including that **of Myengwa Macuba Sibandze vs National Football Association of Eswatini and Three Others, High Court Civil Case No. 1092/20.**

Respondent's arguments

[13] The Respondent's main argument is what seems be the nub of the whole case is that it should be noted at the time of the institution of the proceedings in the court *a quo* on the 26th October, 2018, the Appellant was not an employee of the Respondent having resigned her employment on the 31st July 2018 and that it is common cause between the parties(giving reference to that at folio 7 in the Respondent's Heads of Arguments).

[14] The *Respondent* contends in the main that the nature of the dispute, for monies owed, is not one envisaged by section 8(1) of the Act as read with the definition of **labour dispute** in section 2 and section 85.2) of the Act.

[15] Respondent also cited a number of decided cases by the High Court and the Supreme Court in support of its case.

[16] The Respondent contends that the judgment of the court a quo should be confirmed.

Analysis

[17] The legal question that the court *a quo* was called upon to determine was whether or not the Industrial Court had exclusive jurisdiction to entertain the matter or not. The argument of the Appellant was that section 8(1) of the Industrial Relations Act 2000 (as amended) ("the Act") has no jurisdiction to hear the matter since the Appellant was granted the loan as an employee. The court *a quo* disagreed with this

proposition and held that the Appellant should not be treated as an employee in terms of the Industrial Relations Act as Appellant had resigned from the employment of the Respondent.

[18] I have considered both arguments of the Appellant and the Respondent and I have come to the considered view that the court *a quo* was correct to hold that the Appellant could not enjoy the benefits of an employee. Indeed, it is clear in the papers before us that the court *a quo* was correct in its conclusion that according to the Plaintiff's own Declaration at page 5 of the Record, the Appellant has resigned her employment on the 31st July 2018 and this fact is common cause between the parties.

[19] All in all it appears to me that the Appellant cannot enjoy the benefits of an employee in terms of the Industrial Relations Act, as amended.

[20] On the facts there is no dispute that whilst employed, the Appellant was advanced certain monies by the Respondent to build her own home on Swazi nation land. The loan was not to attract any interest whilst the Appellant was still employed by the Respondent. The loan was to be repaid by the Appellant through salary deductions and in the event she resigned her employment the full outstanding balance would become due.

[21] According to the evidence of Mr Cynthia Vivian on behalf of the Respondent in the court *a quo* the Appellant was advanced a sum of E123,599.41 (One Hundred and Twenty Three Thousand Five Hundred and Ninety Nine Emalangeni and forty One Cent) interest free and Appellant only paid the sum of E32,162.56. There was the balance that was claimed in the High Court.

[22] All in all it would appear before me that the nature of the dispute, for monies owed, is not one envisaged by section 8(1) of the Act as read with the definition of the **labour dispute** in section 2 of the Act.

[23] The claim of the Appellant against the Respondent is not a common law or statutory dispute between an employer and employee for it to be reserved to be determined by the Industrial Court. The Respondent is correct in arguments that it is simply a **commercial dispute** for payment of monies lent and advanced. The Industrial Court does not have jurisdiction to deal with such claims.

[24] For the above reasons the appeal is dismissed with costs.

S.B. MAPHALALA JA

I AGREE

S.J. MATSEBULA JA

I ALSO AGREE

N.J. HLOPHE JA

For the Appellant:	Mr L Dlamini (Linda Dlamini & Associates)
For the Respondent:	Mr. N.D. Jele (Robinson Bertram)