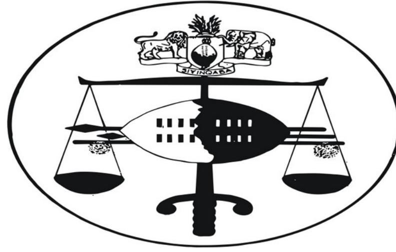

IN THE HIGH COURT OF SWAZILAND

CASE NO. 1008/2005

HELD AT MBABANE

BETWEEN

PRINCESS THANDIWE MTSHALI... PLAINTIFF

AND

TEACHING SERVICE COMMISSION … FIRST DEFENDANT

THE ATTORNEY GENERAL... SECOND DEFENDANT

CORAM

AGYEMANG J

FOR THE PLAINTIFF: D. MANICA ESQ.

FOR THE DEFENDANT: M. ZWANE ESQ.

DATED THE 27TH DAY OF JANUARY 2010

RULING

This is a ruling on points raised in limine regarding the alleged lack of jurisdiction of the High Court to hear and determine the instant action.

In this action, the plaintiff seeks the following reliefs against the defendant:

1. Payment of the sum of E68,856.00;
2. Interest thereon at the rate of 9% per annum a tempora morae;
3. Costs of suit;
4. Further and/or alternative relief.

The matters upon which the suit is based are these. The plaintiff, a teacher at the Mater Dolorosa High School has alleged has alleged in her pleading that she was employed into the Teaching Service by the first defendant in 1987. She averred that at the point of employment, she was placed on a salary scale described as Grade 8 by reason of the fact that she held a Secondary Teacher's Diploma. Subsequently, in September 2000, the plaintiff obtained a Bachelor of Education (Secondary) Degree. The plaintiff who resumed her duties in the teaching Service had the expectation that she would be placed on a scale commensurate with her new qualifications: Grade 10. This however did not happen until November 2003 and then also, it was made to take effect form that date, no reference being made to the back pay from the time she obtained her new qualifications in September 2000 until November 2003. The plaintiff who deems herself entitled to the difference between the pay on scale Grade 8 and scale Grade 10 for that period in the sum of E68,856.00, commenced the present suit seeking inter alia, payment of that sum.

The defendants filed their plea after which the plaintiff filed a replication. The defendants have now raised points in limine to the entire suit. The defendants

who raised two points: on this court's lack of jurisdiction, and the alleged lack of capacity of the first defendant to be sued, in argument, seemed to have abandoned the second point, limiting themselves to the point on jurisdiction.

It is the contention of the defendants that the present suit seeks reliefs which are within the domain of a labour matter between an employer and an employee. The defendants contend that same therefore sins against the provisions of S. 8 (1) of the Industrial Relations Act of 2000 which gives exclusive jurisdiction in labour matters including disputes at common law between employer and employee, to the Industrial Court of Swaziland, thus ousting the jurisdiction of this court. Learned counsel for the defendant relied upon the case of ***Swaziland Brewers Limited and Siboniso Dlamini v. Constantine Ginindza Civil Appeal No 33/2006 at 12*** and ***Delisile Simelane v. The Teaching Service Commission and Anor Civil Appeal No. 22/2006*** in his submission of support of the defendants' contention. The learned judge in the latter case had this to say: "...In my opinion, the wording of section 8 (1) of the 2000 Act can be interpreted in one way only and that is that the Industrial Court now has exclusive jurisdiction in matters arising at common law between employers and employees in the course of employment".

Learned counsel has also urged this court to have regard and to give due weight to the provisions of S.151 (3) of the Constitution of Swaziland and in that enterprise, to dismiss this suit as having been commenced in the wrong forum. The said provision vests exclusive jurisdiction in labour matters in the Industrial Court and was the bedrock of the decision in ***Moses Dlamini v.***

The Teaching Service Commission and Anor. Appeal Case No. 17/2005 at 8.

The plaintiff has vehemently resisted the arguments raised in limine, relying on such cases as: ***Sibongile Nxumalo and Ors v. Attorney General and Ors Court of Appeal Case No. 25, 30, 28, 29/96; Ben M. Zwane v. The Deputy Prime Minister and Anor. Civil Case No. 624/00*** to contend that in spite of S. 8 (1) of the Industrial Relations Act 2000, this court has jurisdiction to hear the instant matter.

The plaintiff contended that she could not have taken her case to the Industrial Court as that would have constituted an application for review of the first defendants' decision by the Industrial Court.

The plaintiff also contended that the provisions of the Constitution of Swaziland were inapplicable as the matters giving rise to the suit arose before the commencement of the Constitution.

At the close of all the arguments this sole matter stood out as the issue to be determined:

1. Whether or not the High Court has concurrent jurisdiction with the Industrial Court in employment disputes at common law.

It seems to me that the answer to this is simple enough and it is that S. 8 (1) the Industrial Relations Act 2000 clearly ousts the jurisdiction of the High Court in labour disputes arising at common law in that it gives exclusive jurisdiction in such matters to the Industrial Court. The said provision reads: "The court shall subject section 17 and 65 have exclusive jurisdiction to hear, determine and grant appropriate relief in respect of an application, claim... in

respect of any matter which may arise at common law between an employer and employee in course of employment..."

The legislation could not have been clearer than that to oust the jurisdiction of this court. The Court of Appeal in Delisiwe's case (supra) held the same. The dictum of Zietsman JA in that case is instructive. The learned judge had this to say: "...In my opinion, the wording of section 8 (1) of the 2000 Act can be interpreted in one way only and that is that the Industrial Court now has exclusive jurisdiction in matters arising at common law between employers and employees in the course of employment".

The argument that recourse to the Industrial court would be to invoke a non-existent review jurisdiction of that court appears to be an artificial argument. The suit herein is an action seeking payment of a sum of money the plaintiff alleges is due to her. She did not come to this court to challenge the decision of the first defendant and to seek a review of it. The action for the money alleged to be due and owing to the defendant by reason of terms and conditions of her employment is included in the definition of a "dispute" contained in S. 2 (f) of the Industrial Relations Act of 2000 and thus properly within the exclusive jurisdiction of the Industrial Court. I regret to say that the cases decided by the courts of Swaziland, cited for my persuasion, decided after the promulgation of the Constitution of the land and were based on it, have no application in the instant matter which arose out of an employment relationship subsisting before the Constitution took effect.

I must also distinguish this decision from the decision of Masuku J in ***Ben M. Zwane v. The Prime Minister and Anor, Case No. 624/00 (Unreported).*** In the present instance, the subject of complaint in this action is regarding an

employment dispute as defined by the Industrial Relations Act 2000 and it arises at common law. In respect of such, exclusive jurisdiction has been vested in the Industrial Court of Swaziland. The Industrial Court does not become vested with jurisdiction only after certain procedures have been adhered to and it becomes seised with the matter. The wording of S. 8 (1) of the Act makes no such clarification. The jurisdiction of the High Court is thus clearly ousted.

It is my view that the point on jurisdiction raised in limine by the defendants herein has merit and should be upheld.

The suit is dismissed accordingly with costs.

MABEL AGYEMANG

HIGH COURT JUDGE