



IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CIVIL CASE NO. 3515/09

In the matter between:

THE ATTORNEY GENERAL

PLAINTIFF

v

DANIEL SHABANGU

DEFENDANT

CORAM
FOR THE PLAINTIFF

:
:

Q.M. MABUZA -J
MR. M. VILAKATI OF
THE DIRECTORATE OF PUBLIC
PROSECUTIONS

FOR THE DEFENDANT

:

MR. M. SIMELANE OF
WARING SIMELANE
ATTORNEYS

JUDGMENT
30/04/2010

[1] The parties herein entered into a Bonding Agreement on the 7th August 2000. In terms of the Bonding Agreement the Defendant proceeded to undertake post graduate studies overseas. The Defendant's studies were paid for by the Swaziland Government. It was

agreed that upon completing his studies the Defendant would work for or be bonded to the Swaziland Government for two years. The Defendant would in the event of his resignation from the Government before the expiry of the two year period, pay the Plaintiff liquidated damages in an amount equal to the undischarged bonding period in relation to his salary at the date of resignation.

- [2] The Defendant upon his return worked for the Government from 1st October 2001 and resigned on the 1st August 2002. The Plaintiff is now suing the Defendant for damages for breach of contract in the amount of E88,218.62 (Eighty eight thousand two hundred and eighteen sixty two cents).
- [3] At the time the contract was concluded the relationship between the parties was that of employer and employee. In his plea the Defendant has taken the point that the subject matter of this dispute falls within the exclusive jurisdiction of the Industrial Court.
- [4] The issue of jurisdiction has to be decided before the matter proceeds any further. The Defendant has cited section 8 (1) of the Industrial Relations Act 1/2000 to fortify his arguments which states:

“The Industrial Court shall subject to sections 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, the Employment Act, the Workmen’s Compensation Act, or any other legislation which extends jurisdiction to the Court ***or in respect of any matter which may arise at common law between the employer and employee in the cause of employment.***” (My emphasis)

[5] The Defendant relies on the following words (italicized above) “... ***or in respect of any matter which may arise at common law between the employer and employee in the cause of employment.***” He contends that the Bonding Agreement is such a matter which has arisen at common law. (My emphasis).

[6] The Defendant further argues that section 8 (2) (a) of the Industrial Relations Act provides that:

“An application, ***claim*** or complaint may be lodged with the Court by or against an employee, an employer ...” (My emphasis)

The Defendant contends that the Bonding Agreement does not specify which Court should exercise jurisdiction. When one has regard to the word “***claim***”

found in section 8 (2) (a) of the Industrial Relations Act, the Plaintiff's matter falls to be determined by the Industrial Court. The failure to specify the Court to exercise jurisdiction does not give the Plaintiff the latitude to choose which court to pursue the claim in.

- [7] The Plaintiff on the other hand contends that its action seeks to enforce a penalty clause in the contract (Bonding Agreement) between it and the Defendant arguing that contractual penalties in this country are regulated by the Contractual Penalties Act 13/1971.

Consequently the Plaintiff states that this Court has to decide whether the dispute flowing from the application of the Contractual Penalties Act falls within the exclusive jurisdiction of the Industrial Court.

- [8] The Plaintiffs argument is that section 8 (1) of the Industrial Relations Act 1/2000 provides as follows:

"The Industrial Court shall subject to 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, ***the Employment Act, the Workmen's Compensation Act, or any other legislation which extends jurisdiction 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.” (My emphasis)

[9] Thus the Plaintiff argues that the Industrial Court has exclusive jurisdiction only in matters arising from the application of the provisions of:

- The Industrial Relations Act;
- The Employment Act;
- The Workmen’s Compensation Act;
- Other statutes that confer jurisdiction on the Court; and
- The common law of master and servant.

[10] The Plaintiff contends therefore that, the Contractual Penalties Act 13/1971 is not one of the statutes listed in section 8 (1) of the Industrial Relations Act. In addition the Contractual Penalties Act does not extend jurisdiction to the Industrial Court. Consequently the Plaintiff argues that the Industrial Court has no jurisdiction to hear and determine a suit involving the application of the Contractual Penalties Act.

[11] The Defendant states that the Contractual Penalties Act does not apply because the Bonding Agreement only requires that the Defendant reimburse the Plaintiff and

not to pay damages. To reimburse is to restore, hence a stipulation which embodies a creditor's common law claims to cancellation and restitution upon breach of contract is not a penalty stipulation.

[12] I disagree with the Defendant. The Bonding Agreement does not provide for a cancellation and restitution only. Reimburse also means to repay a person who has spent or lost money (Oxford dictionary). Section 2 of the Contractual Penalties Act states:

“penalty provision” means a provision in an agreement in terms of which any person becomes liable to **pay a sum of money or deliver or perform** anything for the benefit of a promisee either by way of penalty or liquidated damages in respect of **an act or omission in conflict with any obligation under any agreement**”. (My emphasis)

“penalty” means any sum of money for the payment of which or anything for the delivery or performance of which any person may become liable to a promisee.

[13] The above provisions speak for themselves and need no further interpretation. I agree with Mr. Vilakati that section 8 (1) of the Industrial Relations Act 1/2000 excludes the Contractual Penalties Act 13/1971.

[14] I accordingly hold that:

- (a) this Court has jurisdiction to hear this matter.
- (b) the jurisdictional point raised by the Defendant is hereby dismissed with costs.

Q.M. MABUZA -J