

## **IN THE HIGH COURT OF SWAZILAND**

**HELD AT MBABANE**

**CASE NO. 4159/08**

**In the matter between:**

**SWAZILAND GOVERNMENT**

**APPLICANT**

**VS**

**ZEBLON MHLANGA**

**RESPONDENT**

**CORAM**

**MAMBAJ**

**FOR APPLICANT**

**MR. T. VILAKATI**

**FOR RESPONDENT**

**MR N.D. JELE**

**JUDGEMEN  
T 26/05/09**

[1] The Applicant is the Government of the Kingdom of Swaziland and is the rightful owner of certain premises known or referred to as House Number MA15, Ben Dunn Street, Mbabane, Hhohho District and the Respondent is in occupation of the said house. Although it is not clear from the papers before me when the Respondent took occupation of the house, this was after he had been employed as a servant of the Applicant and this was part of the terms and conditions of his employment aforesaid.

[2] It is common cause that, following certain complaints and an internal disciplinary hearing against the Respondent, he was summarily dismissed from his employment by the Applicant on the 10<sup>th</sup> July, 2002 and his dismissal was to take effect from the 19<sup>th</sup> of that month. Through further correspondence between the parties, the Respondent was told to vacate the said house as his contract of employment which permitted him or by virtue of which he was allocated occupation of the house, had been terminated. The Respondent took the view that he was unlawfully dismissed from his employment, and it is common cause that this issue of his dismissal from employment is pending before the Industrial Court. The details of that case and the stage at which it stands have not been disclosed in this application. Nothing turns on this though in this application.

[3] The Respondent has refused to vacate the house in question and has argued that pending finalization of the case for his dismissal from employment, he is entitled to remain in occupation of the house. He argues further that it was agreed between the parties that "it was part of my conditions of service that in the extent [sic - event] of a contestation of my dismissal or payment of terminal benefits, I would not be obliged to vacate the house that had been allocated to me." (Per paragraph 16.3 of his answering affidavit). Such an agreement or condition or term of employment is denied by the Applicant. The Respondent has also taken a point of law (in limine) that this court:

"has no jurisdiction to entertain this matter because it arises out of a contract of employment and exclusive jurisdiction of such matters is vested in the Industrial Court in terms of the provisions of section 8 (1) of the Industrial Relations Act, 2000 (as amended)."

I shall deal with this point of law first as it has the potential of finalizing the matter without going into the merits or factual elements of the Application.

[4] Section 8 (1) of the Industrial Relations Act 1 of 2000 (as amended) (hereinafter referred to as the IRA) provides as follows:

"8(1) The 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 an employer and employee in the course of employment or between an employer or employer's 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."

[5] It is, I think, settled law in this jurisdiction that section 8(1) of the IRA reserves exclusive jurisdiction of the Industrial Court on any matter between those persons or bodies enumerated therein where such matters arise at common law in the course of employment. In the case of **DELISILE SIMELANE v THE TEACHING SERVICE COMMISSION AND ANOTHER, CIVIL APPEAL 22/06** (unreported), the Supreme Court stated this position as follows:

"When the new Industrial Relations Act, Act No. 1 of 2000, was passed the legislature must be presumed to have known what interpretation had been placed by judgements such as the **Nxumalo** judgement and the **Secretary to Cabinet** judgement on section 5 (1) of the 1996 Act in respect of disputes between employers and employees. The Legislature, in the 2000 Act elected to amend the jurisdiction question relating to common law disputes between employers and employees, and effect must be given to the amendment.

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 fact that special procedures for the determination of disputes have to be followed before the matter comes before the Industrial Court does not alter the position." The same point was made by the same court in **SWAZILAND BREWERIES LTD AND ANOTHER v CONSTANTINE GININDZA, Civil Appeal 33/06** (unreported judgement delivered on the 16<sup>th</sup> November, 2006), where

RAMODIBEDI JA after referring to the two precursors of the IRA  
stated that:

"The effect of this change, read with the use of the word "exclusive" in the section makes it plain in my view that the intention of the legislature in enacting section 8 (1) of the Act was to exclude the High Court's jurisdiction in matters provided for under the Act and thus to confer "exclusive" jurisdiction in such matters on the Industrial Court.

It is important to recognize that the purpose of the legislature in establishing the Industrial Court was clearly to create a specialist tribunal which enjoys expertise in industrial matters.

In the context of the legislative scheme and object of the Act as fully set out above I am satisfied that the intention of the Legislature was to confer exclusive original jurisdiction on the Industrial court in matters provided for under the Act. Put differently, all such matters must just go to the Industrial Court. It is only after the latter court has made a decision or order in the matter that an aggrieved party may approach the High Court for review on common law grounds. It follows that by launching his review application in the High Court before the Industrial Court had made a decision or order in the matter, the Respondent chose the wrong forum."

That, I trust, is sufficient as to the nature and meaning, import and purport of section 8 (1) of the IRA and its applicability in general.

[6] In the present application it has been argued by the Applicant that its cause of action for the ejectment of the Respondent from its house is the Respondent's illegal occupation thereof after his dismissal from employment. The matter, so the argument went, is not one arising in the course of employment, as stated in the subsection. Superficially or at a glance, this argument may sound attractive and it was not in issue in any of the cases I have referred to above.

[7] In support of its argument that this court has jurisdiction to hear the matter herein, the Applicant relied on the judgement by Masuku J in the case of **CARGO CARRIERS (PTY) LTD v JERRY**

**DLAMINI, case no. 2053/99**, (unreported judgement delivered on the 9<sup>th</sup> September, 1999). This is a case, as in the present application, where the applicant sought to eject the Respondent from its house allocated to him in terms of an employment contract. The Respondent had been dismissed from his employment but had refused to vacate the house and hence the application to have him evicted. The issue of the jurisdiction of this court was not raised at all. The respondent raised a preliminary point contending that the application was not urgent. This was the only point for decision and it failed. In the course of his judgement Masuku J had this to say :

"There are numerous decisions of this court to the effect that an erstwhile employee may not continue to occupy the former employer's house, given to him as part of the employment

contract once the employment contract has been terminated.

This is so, notwithstanding that there may be pending issues

relating to unfair dismissal." I, with due respect, concur with this general statement of the common law. See in this regard the cases cited by the learned judge in support of this point and the case of **PALABORA MINING CO. LTD v COETZER 1993 (2) SA 306 at 310J** where Mahomed J (as he then was) stated as follows:

"What is common cause is that the Respondent has been dismissed, that he no longer works for the applicant, and that no court has held that his dismissal was unfair, or that he should be reinstated. It seems to me clear in these circumstances that, notwithstanding the proceedings pending in the Industrial court, I have jurisdiction to order the Respondent's ejectment. **RANDFONTEIN ESTATES GOLD MINING CO (Witwatersrand) LTD v FORBES 1992 (1) SA 648 (w)**".

[8] I have stated above that the issue of this court's jurisdiction or lack thereof was not raised in the **JERRY DLAMINI** case (supra) and the case was, in any event, decided based on the 1996 IRA which did not have a provision similar to the one under consideration herein. (The historical changes and effect in the Industrial relations legislation that culminated or led to the enactment of section 8 (1) of the IRA of 2000 are comprehensively discussed in the two judgements of the Supreme Court I have referred to above.) Similarly, I do not read anything in the **PALABORA** judgment (supra) which suggests that the South African Labour Legislation contained anything akin to our section 8(1).

[9] Mr Jele, Counsel for the Respondent relied for his objection on the decision of this court in the case of **UBOMBO SUGAR LIMITED v GRAHAM HADEBE**, case number 1546/03 - Ruling handed down on the 31<sup>st</sup> July, 2003. As in the present application, the Applicant sought to evict the Respondent, its erstwhile employee, from its house following the termination of the contract of employment on 13<sup>th</sup> February, 2002. The house had been allocated to the Respondent as part of his terms and conditions of employment. An objection based on the provisions of section 8 (1) of the IRA was successfully raised and in upholding the objection Nkambule J stated as follows:

"The exclusive jurisdiction which is conferred by section 8 of the Industrial Relations Act [2000 as amended] to the Industrial Court is in respect of any matter

- (1) Which may arise at common law between an employer and employee in the course of employment;
- (2) Between employer and employee's association and a trade union or staff association; or
- (3) Between an employers' association, a trade union, a staff association, a federation and a member thereof.

It is the opinion of this court that this matter falls in category (a) above. This is because the employer gave the Respondent accommodation as part of his terms and conditions of employment".

The learned judge also pointed out that the Applicant must either refer the matter to arbitration or to the Industrial Court as provided under section 18 (3) of the IRA.

[10] Counsel for the Applicant submitted that this decision **(UBOMBO SUGAR)** is clearly wrong inasmuch as it never considered the phrase 'in the course of employment' that is contained in s 8 (1) of the IRA.

Mr Vilakati submitted that the cause of action arose after the termination of the employment contract and therefore not in the course of employment between the parties. I am constrained to disagree.

[11] I accept that the Applicant is exercising its common law rights to eject the Respondent from its house. This is, however, on a matter arising in the course of employment. Put differently, it was during or in the course of employment that the employment contract was summarily cut short by the dismissal of the respondent by the Applicant. That automatically ushered in the right of the owner of the property to retake possession of it. It is a cause and effect situation or chain. Whilst it is true that the original or initial occupation of the house by the Respondent was lawful and based on the relevant contract of employment, this occupation continued, albeit on a different footing or status, after the termination of the contract of employment by the Applicant. It would be rather artificial and casuistic to hold that the occupation of the dwelling by the Respondent, post or after his dismissal was a totally new and separate one. The break in the chain contended for by the Applicant is imaginary or at least treated as such by the IRA. I say so based on the wording of section 18 thereof which provides that:

"18(1) Where an employee's normal place of residence is provided by the employer, or is otherwise associated with the employment, an employee and

the employee's family shall not be compelled to leave such residence until one calendar month from the day of the termination has lapsed. ...

(3) Where an employee fails or refuses to leave the residence as stipulated in section (1), the employer shall be entitled to refer the matter for arbitration or adjudication and apply for compensation." From the above provisions, it is plain to me that the IRA views the

issue of occupation as one continuous transaction from inception until

resolved and determined by the parties by mutual consent or by the

processes available to the employer under section 18 (3). The fact

that the IRA details or lays down how the issue of residence is to be

resolved after termination of employment is ample justification in my

view, that it treats or regards the issue, even after termination of the

employment contract, as a matter arising in the course of employment and as an issue to be regulated under the IRA. The IRA, per section 18(3), dictates that such issue be dealt with under

arbitration or adjudication. Clearly, the adjudicative proceedings

contemplated are to be in the industrial court.

[12] This is an application based on or founded on an infringement of section 18(1) of the IRA. This sub section allowed or permitted the respondent to be in occupation of the relevant house until the 19<sup>th</sup> August, 2002; one calendar month after his dismissal from employment. It is this failure to vacate the house that has necessitated this application. This application is therefore one in respect of or based on a complaint or infringement of a provision of the IRA as set out in section 8 (1) of



the Act. It is therefore a matter for or within the exclusive province of the Industrial Court. Contrary to the applicant's contention, this section does not stipulate that the cause of action must be one arising in the course of employment.

[13] An objection similar to the one under consideration was raised in the case of **NATAL TRUST FARMS (PTY) LTD v NZUKULU AND OTHERS, 1998 (4) SA 1026 (NPD)**. This was again, an application for eviction following the dismissal of employees and was based on sections 157 and 158 of the Labour Relations Act 66 of 1995 of South Africa, which granted the labour court "exclusive jurisdiction in respect of all matters that ...are to be determined by the labour court." HUGO J dismissing the objection held that an owner of property has a right at common law to evict persons occupying the property subject to any contractual or other rights the occupier might have had. Even if the occupier was, by virtue of a contract of service, entitled to occupation, where the legality of the termination of that contract was not in issue the High Court would have jurisdiction to order the eviction. The learned Judge at 1028G-I specifically stated that in the context of the South African legislation, he was "not aware of any Act of Parliament that has assigned to another court the power to order the eviction of people such as the present respondents. Of interest also in connection with the provisions of s158 of the Labour Relations Act is that the section does not purport to give to the Labour Court the exclusive power to make the orders referred to in that section."

So, clearly, the pieces of legislation that were considered in this case were different from those I have to consider in terms of our own Industrial Relations Act, namely s8(1) and s18 of the IRA. (In South Africa, section 8(2) and (3) of the Tenure Act 62 of 1997 seems to contain some of the elements or requirements of both sections 8(1) and 18(3) of the IRA.)

[14] In the result the UBOMBO SUGAR judgement has not been shown to be patently wrong and it is binding on me. In fact the judgement is in my respective view correct. Consequently the point in limine is upheld with costs. This court has no jurisdiction to hear this matter. The Applicant has to pursue its claim as stipulated under section 18(3) of the IRA.



MAMBA J