IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Civil Case No. 378/2016

In the matter between

ROGER MABUYA **APPELLANT**

And

THE LUKE COMMISSION **RESPONDENT**

Neutral citation: *Roger Mabuya v The Luke Commission* (378/2016) [2017] SZHC 162 (07 July 2017)

Coram: **MAMBA J**

Heard: **07 July 2017**

Delivered: **07 July 2017**

[1] Civil Law – agreement of employment – work to be rendered under supervision and monitoring of employee on daily basis – pay to be based on level of effort exerted – employer/employee relationship created because of close level of supervision.

[2] Civil Law – agreement of employment – dispute arising therefrom to be reported to Conciliation Mediation and Arbitration Commission (CMAC) before being filed in

court – Industrial Court has exclusive jurisdiction to hear such dispute per Section 8 of Act 1 of 2000 (as amended).

[1] This is an appeal against the decision of the Manzini Magistrate which was delivered on 30 November 2016.

[2] In the Notice of Appeal, the Appellant states that the court below erred in law and in fact:

> ‘1. --- by basing its decision on the fact that Appellant was engaged in his personal capacity when entering into a verbal construction agreement with the respondent.
>
> 2. --- by holding that for his supervision services at Respondent’s construction site, the Appellant was entitled to some remuneration, and that Appellant was suing for unpaid wages --- as per the contract of employment that existed between the parties.
>
> 3. --- in holding that the relationship that existed between the Appellant and Respondent in their verbal construction agreement was a contract of work and services, and that the relationship that

existed between the parties was an employer/employee relationship, and,

4. --- in finding that it had no jurisdiction to hear the matter --- because the issues contained therein are labour related and that the Industrial Court has [exclusive] jurisdiction to hear the matter.'

[3] It is fair to say that there is in essence, only one ground of appeal based on the four that have been stated above. That ground of appeal is that stated under 3; namely the holding by the court that this was a labour matter or issue and consequently had to be dealt with in the Industrial Court which had exclusive jurisdiction on such issues. What is stated as ground of appeal number 4, follows logically from the holding or finding in 3 and is therefore, *strictu senso*, not an independent or separate ground of appeal.

[4] I shall briefly state the facts upon which the decision of the Learned Magistrate was based. In so doing, I shall,

however, caution that this was perhaps not a case that could have been properly decided on the pleadings as presented to the court then. There was a dispute of fact on the issues pleaded. However, there is no need to decide on that issue in this appeal as both parties were content to have the appeal determined purely on the correctness of the judgment of the court *a quo*. I shall do so.

[5] The Appellant issued a combined summons against the Respondent claiming payment for a sum of E17, 600-00 and other ancillary relief. The basis for the action or claim was that

> 'On around October 2013, the plaintiff entered into a verbal construction agreement with the defendant [whereby the] plaintiff would supervise the construction work, building walls, ground work and planting of trees.'

The Appellant was to be paid a sum of E800-00 per day for the work. The Appellant stated further that the Respondent unlawfully and wrongfully terminated the said

agreement on 20 March 2014 after the Appellant had worked 22 days. The total amount claimed is based or calculated on the said number of days worked.

[6] For Some reasons that are not relevant for purposes of this appeal, the Respondent did not defend the action and default judgment was entered in favour of the Appellant. However, subsequent to this, the Respondent moved an application for the rescission of that default judgment.

[7] In its rescission application, the Respondent stated, amongst other things, that the material terms of the verbal agreement were:

> '8.2 --the [Appellant] will be paid on a level of effort he will put into the work;
>
> 8.3 --the [Respondent] will supervise the [Appellant's] work on a daily basis;
>
> ---
>
> 11. The [Appellant] then started swearing at me and told me that, he was to do everything in his power to fix the organization. He even

threatened to kill me. I did not take him seriously as I thought it was just a prank but I did report his death threats to the police. He tried on many occasions to threaten me into paying him for work he did not do.'

Later, the Respondent stated that:

'The fact of the matter is that the [Appellant's] claim is one that arises out of an employment context and hence an employee/employer relationship existed between the parties. --- the proper forum to deal with this matter was the Conciliation Mediation and Arbitration Commission (CMAC), in terms of the Industrial Relations Act 2000 (as amended).'

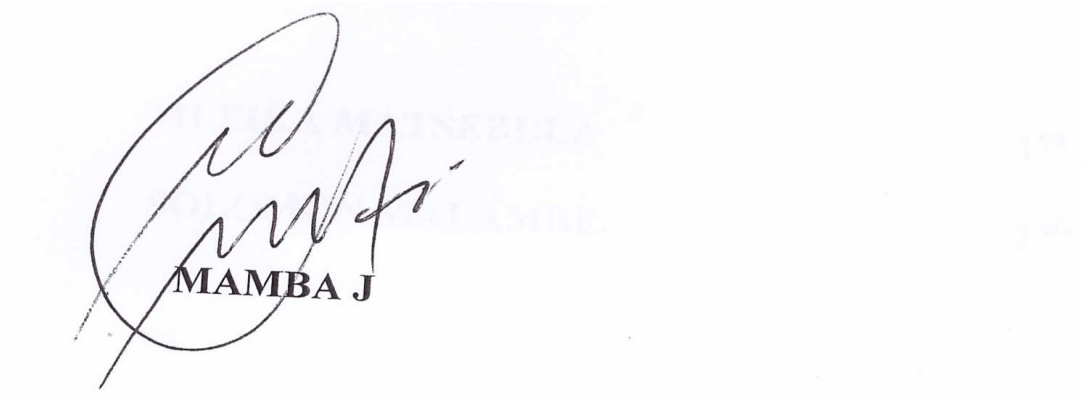
[8] The rescission application was not opposed and was granted by consent or agreement of the parties. The Respondent's Founding Affidavit therein, it was agreed would serve or stand as the Respondent's plea in the action. In turn, the Appellant filed a Replication. Nothing significant is stated therein save that the Appellant

insisted that he had worked for 22 days and thus his claim for E17, 600-00.

[9] From the above facts, it is plain to me that the Appellant did not dispute the fact that he was engaged by the Respondent to do a specified job and was to be under the supervision, control or management of the Respondent. Furthermore, he was expected to be at work on a daily basis and his pay was to be calculated or based on the 'level of effort he will put into the work.' In a word, he was to be controlled, supervised and monitored on a daily basis by the Respondent. If his work fell below that which was expected of him by the Respondent, his rate of pay per day could be reduced from that stated in the agreement or that his services could be terminated. That, in my judgment, is implicit in the terms pleaded by the Respondent. These terms were, for purposes of the matter serving before the court *a quo*, taken as correct and the Learned Magistrate was requested to make a decision based on those terms.

[10] The court a quo came to the conclusion that the verbal agreement between the parties was that of an employer/employee and consequently, the Industrial Court had exclusive jurisdiction thereon. The action therefore failed. That ruling cannot be faulted in my judgment. That the Appellant was employed as a supervisor did not mean that he was an independent contractor. He was clearly subject to the strict daily supervision of or by the Respondent; his employer.

[10] That being the case, the appeal is dismissed with costs.



FOR THE APPELLANT: MR. DLAMINI

FOR THE RESPONDENT: MR. M. DLAMINI