In the High Court of Swaziland

Civ. Appeal Case No. 7/93

In the matter between:

Swaziland Building Society — Appellant

and

Swaziland Financial Institution and Allied Workers — Respondent

CORAM: Hull, C.J.
FOR APPELLANT Mr. Flynn
FOR RESPONDENT Mr. Kennedy

Judgment
(1/12/93)

The appellant is an employer and the respondent a union. In July of 1991, differences arose between them concerning one of the employer's staff, who was also an official in the union and had taken time off for several days to deal with union business.

On 2nd April 1992, the employer under section 50 (1) of the Industrial Relations Act 1980 reported a dispute to the Labour Commissioner in respect of the matter.

Then on 6th April 1992, the union itself wrote to the Commissioner reporting a dispute. This clearly included the issues that the employer had already raised, which related to the employee's absence on union business for several days from 28th July to 9th August.

It went further, however. It referred to a subsequent occasion in November on which the union had requested

2/...

further time off, on union business, for the employee, and to a warning letter which the employer had written to the employee on 2nd January 1992, dealing (inter alia) with his absence on such business on that later occasion, after the employer had refused to agree to such absence. As far as that was concerned, the union in its report of 6th April sought the unconditional withdrawal of the warning letter.

On 29th April 1992, the Commissioner certified an unresolved dispute under section 58(1) of the Act.

In paragraph 3, he described the issues in dispute as being (a) whether the employee was entitled to be paid for the period when he was absent on union business "in contravention of article 4.5 " of a recognition agreement that had been made between the employer and the union and (b) whether his absence for the period from 26th July to 9th August in 1991 was reasonable.

In paragraph 4, he referred to the dispute as having been reported to him on 2nd April 1992, and certified it as an unresolved dispute.

He then set out in paragraph 5 the reasons why he considered that no useful purpose would be serve by continuing to conciliate. In doing so, he recited the course of events between the parties, referring eventually to an offer of compromise by the employer as to the paying of the employee, the insistence by the union that this settlement be linked to the withdrawal of the warning letter, and the rejection by the employer of the linking of those two issues and its withdrawal of its offer. In the last subparagraph of paragraph 5, the Commissioner noted that the parties agreed to disagree, and went on to say that as provided in section 54(4) of the Act "the dispute" was declared unresolved, as no useful purpose would be served by continuing to conciliate.

The employer on the following day applied to the Industrial Court for the determination of an unresolved dispute. In paragraph 7 of its application, it identified the dispute as relating to the absence of the employee from work from 26th July to 9th August. In the previous paragraph, it had asserted that the union's own report of 6th April was not a report as such, but rather a reply to its report.

In paragraph 8, it referred to its offer of compromise, and went on to say that the union, while willing to accept the compromise, had "made a new and unreasonable and unacceptable demand on the applicant which was unacceptable to the applicant and which had resulted in this matter being an unresolved dispute."

In its reply, the union denied that the employer had correctly described the "disputes" between the parties. It asserted in paragraph 2 that its own report was not a merely a reply (i.e. to the employer's original report to the Commissioner) but an actual report of a dispute which raised "an entirely fresh issue", namely the warning letter. In paragraph 3, it identified the "disputes" as being (to summarise them):-

(a) the differences between the parties as to the employee's absence from 26th July to 9th August; and

(b) the issuing of the warning letter on 2nd January.

It appears from the record in this appeal that the parties agreed that the matter could be decided on the papers in the Industrial Court, that no point was taken as to whether the reference to that Court was within time, and that there was preliminary argument before and a ruling by the Industrial Court as to the matters in dispute in the application before it.

The preliminary question, in substance, came down to whether or not the Industrial Court was properly seised of the issue over the

4/...

warning letter. The Industrial Court ruled that it was, and that the two matters in dispute thus related, in effect, to the employee's absence from 26th July to 9th August and the sending of the warning letter on 2nd January.

The Court went on to order, in determining the application on its merits, that the employer was to pay the employee for the time that he was absent in July and August, and that it was to withdraw the warning letter.

The employer now appeals against the Industrial Court's judgment. It does so, essentially, on three grounds, which can conveniently be set out (and dealt with) in the following sequence, namely:

(a) The Industrial Court erred on law in determining that the warning letter was in issue in the application before it.

(b) It erred in law by exceeding its jurisdiction, in ordering the appellant to withdraw it.

(c) It erred in law in ordering the employer to pay the employee during his absence from duty from 26th July to 9th August.

It is convenient, too, to deal with the first two grounds of appeal together.

In its eventual judgment, having first referred to its preliminary ruling on the matters in dispute, the court said that the determination of the issue raised by the respondent in its reply had been adjourned and that the parties had been invited to address the court before it gave its decision. It also stated that the parties had done so. It appears to me from the record that these things were so.

It dealt with the warning letter very shortly, in the last paragraph of its judgment, saying:

"There is no dispute that Annexure 'D 10" (i.e. the letter) "is in breach of section 70 of the ...Act. The remedy for the breach lies in section 76 .... We do not think that a fine would be the appropriate remedy in this instance. The appropriate remedy is directing the applicant to withdraw....the letter... We accordingly order the applicant to withdraw Annexure D10."

At the hearing of this appeal, it was common ground that the first sentence of that last paragraph was incorrect, inasmuch as the appellant had argued in the Industrial Court that the warning letter was not in breach of section 70 of the Act.

Mr. Flynn, for the appellant, submitted that the scheme of the Act, in relation to the settlement of a dispute under Part VII, is to require the parties to submit first to conciliation and that, as far as the present matter is concerned, the Industrial Court could not entertain the matter unless the Labour Commissioner, having attempted conciliation, had certified under section 58 (1) that the dispute was unresolved. It was the dispute as so certified that fell to be determined by the Industrial Court. In this regard, he cited Swaziland Fruit Canners Pty Limited v. Vilakati and Dlamini (Industrial Court Appeal 2/87) and Ubombo Ranches v. Pan Attendants (Industrial Court Appeal 6/90) both being decisions of this court.

The Commissioner's certificate, Mr. Flynn contended, patently did not include the warning letter in its definition of the dispute. The respondent had in effect acknowledged in its reply that it was a separate, subsequent issue. Moreover he argued, the issue of the warning letter did not fall within the definition "dispute" in section 2 of the Act and the Industrial Court had no power, at least under Part VII, to under its withdrawal. Although the Industrial Court had invoked section 76, in Part VIII of the Act, it had done so incorrectly. The respondent had never

filed an application under that section; the appellant had never had the opportunity to respond to it.

In responding on behalf of the union, Mr. Kennedy said that as a matter of fact the two issues were clearly related. They had both been in issue, together, before the employer had reported a dispute under section 50(1).

He submitted that although the Act requires that disputes are in the first instance to be referred to the Commissioner for conciliation, and that he is to certify an unresolved dispute before it is taken to the Industrial Court, that does not mean that the Labour Commissioner has the final say. I understood him to be saying, in that respect, that although it was the function (and duty) of the Labour Commissioner to certify an unresolved dispute, his definition of the scope of the dispute was not final. It was open to review in the courts.

Mr. Kennedy also submitted that the issue of the warning letter clearly fell within the meaning of a "dispute" in section 2 of the Act, and that the Industrial Court had powers under sections 7 and 13 to order its withdrawal.

As a matter of fact, by the time the employer came to report a dispute to the Commissioner, the parties were clearly at odds both over the absence of the employee from 26th July to 9th August and as to the issue of the subsequent warning letter of 2nd January. The two matters were in fact closely related in that there had been an issue, on the first matter, as to whether the employee's absence was reasonable, and the warning letter had to do with his absence, for the same purpose, on a subsequent occasion. More broadly, both matters had to do (inter alia) with the absence of an employee on union business under section 75.

In the way in which he drew his certificate, on a strictly formal interpretation of the document, the Commissioner did limit it to the question of the employee's absence from 26th

July to 9th August. He did refer specifically to, and only to, the report by the employer on 2nd April. He also referred to the certificate however; to the issue of the warning letter; and I think it is evident from the certificate that issue must have been under consideration by him when seeking to conciliate.

My own view is that by the time the employer came to report a dispute to the Commissioner, the true nature of the dispute included the warning letter and, that in reporting the dispute, the employer did not fully describe it. I am also of the view that in defining the dispute formally in his certificate, the Commissioner did not identify it fully. I do not regard the reference in paragraph 2.1 of the union's reply, to "an entirely fresh issue", properly construed, as meaning that the two matters were unrelated, and I do not attach significance to the subsequent references in that reply to the words "disputes".

The Industrial Court, in my judgment, correctly identified the matters in issue. It appears from the record that the employer was given opportunity both to make submissions before it as to the extent of the dispute and, after its ruling, as to the merits of the issues (as identified by the Industrial Court).

I cannot see that any prejudice has been occasioned to the employer or that the scheme of the Act has been denied. The point taken by the employer is a technical one. In substance, I consider that the certificate encompasses the whole of the dispute as defined by the Industrial Court.

I am also of the view that the issue over the warning letter is a dispute within the meaning of paragraphs (e) and (f) of that term as defined in section 2, and that the Industrial Court in dealing with it, had power under section 13(1) to order the withdrawal of the letter.

8/...

I agree with Mr. Flynn that in this case the Industrial Court did not have properly before it an application, as such, under section 76.

It is apparent from the record that the Industrial Court, in dealing with the letter, wrongly assumed that there was no dispute as to whether the letter contravened section 70, and that it wrongly dealt with the matter under section 76.

It is also clear that the only portion of the letter in issue was the very first of the three complaints in it, namely that the employee attended a union meeting without the authority and approval of the branch manager.

Nevertheless it is clear that, within the scope of the application under Part VII for the determination by the Court of an unresolved dispute, the employer was fully heard by the Court on the issue of the warning letter.

It is apparent from the record before this court that the nature of the dispute as to the events of 26th July - 9th August 1993 has been trimmed considerably in the course of the legal process. The surviving issue, in this appeal, is simply whether the Industrial Court erred in law in ordering the employer to pay its employee's salary during his absence at that time. It had at different times earlier been a fuller issue and, if I may say so, as it appears from the record, at times a slightly confused one. Paragraph C 2 of the employer's report of the dispute, and paragraph 7.2 of its application, do not to my mind make sense. The words "in contravention of article 4.5 of the recognition agreement" in the third paragraph of the Commissioner's certificate are in my view on the one hand ambiguous and on the other not apposite, and it appears to me that this may stem from the way in which the employer sought to identify the issues. These things might also have had a bearing on the way in which the Industrial Court eventually came to approach the matter.

In the end, however, the surviving issue before that Court was simply whether or not, if the employee was absent from work on union business without the prior consent of the employer, the latter was in law obliged to pay him.

The employer's case is that although, under section 75(4)(b) of the Act, an employer is obliged to allow staff time off on union business, it has a discretion whether or not to pay them during such absences. Under the recognition agreement that it subsequently made with the union, the employer here bound itself to pay staff who were absent on such business, but only if its prior consent had been obtained. In this case it was not. Accordingly the employer had no obligation to pay the employee for his absence in July and August on union business.

The relevant paragraph in the agreement is 4.5. It provides that no union representative shall "be victimised or suffer reduction in pay" while dealing with union business, "so long as he has obtained the prior consent of his immediate superior" or "the union has obtained the prior consent of the managing director/general manager" of the undertaking.

In reaching its decision, the Industrial Court noted that the employer conceded that it was bound to give union officials time off on union business, and that they were not obliged to obtain its permission to be absent on such business. With respect, although it is not the issue as such here, that appears to me to be correct. Staff who are union officials are, under section 75(4)(b), entitled by law to reasonable time off for such purposes. What is reasonable is a matter of objective fact. I agree with the Industrial Court that there is no implication, in that provision, that the employer must consent to the absence.

The issue here, however, is whether the employer, not having given prior consent to the employee's absence, was bound to pay him.

10/...

At page 2 of its judgment, the Industrial Court said:

"Speaking for ourselves and on the strength of the submissions made by the parties and the documents presented before the court, it is clear that the parties assumed that a responsible attitude would prevail between them and that a spirit of give and take would exist. The parties assumed it would appear that since section 75(4) obliged the employer to give his consent, the employer would abide. Section 75(4)(c) made it mandatory that the employer would allow him off."

This appears to me to be a somewhat uneasy passage. The first sentence is strictly irrelevant, as far as the legal point now in issue is concerned. I will return to the legal significance of section 75(4)(b) in a moment.

In the next paragraph of the judgment the Court, having found on the evidence that the executive members of the union were involved in its business affairs during the period in question, goes on to hold that it was reasonable for the employee to be absent from duty (on such business), and concludes that he was entitled to be paid during his absence.

From those portions of the judgment, and from the two paragraphs in it that follow the last one that I have referred to, it is evident that in so far as the Industrial Court has demonstrated its reasons for its conclusions, it has taken the view that because section 75(4)(b) requires an employer to allow union officials reasonable time off, it was unnecessary to seek the employer's prior consent in order to sustain a claim of right to be paid.

In this appeal, the union adopts the same reasoning as the Industrial Court.

Section 75(4)(b) does not, however, say that an employer must consent to an employee's absence on union business.

11/...

What it says is that an employee representing a union is entitled as of right to reasonable time off to deal with such business. It is unnecessary to imply from this that the employer is to be deemed to have consented. Whether or not he has consented is irrelevant. The legislative has ordained it, i.e. the right to have time off.

It has also stipulated, however, that whether or not an employee is to be paid for this facility is a matter of discretion, at least as far as the requirements of the law are concerned.

In the present case the employer has, by a subsequent agreement, committed itself contractually to one way in which it will exercise that discretion. If prior consent is obtained, it will pay the employee's salary. In these circumstances, it is bound contractually to the union to do so. But if prior consent is not obtained, then it is entirely a matter within its discretion. It is not bound to do so.

In the result, on this last ground of appeal, I am of the view that the Industrial Court erred in law in holding that section 75(4)(b) required or deemed the employer to consent to the absence of the employee on union business and, because of that, and because the absence was reasonable, that the employer was therefore bound to pay his salary during his absence.

Accordingly, I make the following orders: The judgment of the Industrial Court, in so far as it orders the employer to pay the employee's wages for the period from 26th July to 9th August 1991, and in so far as it orders the employer to withdraw that part of its letter of 2nd January 1992 that

deals with the second and third complaints there set out, is set aside, but is otherwise affirmed.

D. Hull

DAVID HULL
CHIEF JUSTICE

(After further submissions, the respondent was ordered to pay seventy-five percent (75%) of the appellant's costs on the appeal, as taxed if not agreed.)