IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO.: 41/96

In the matter between

MILTON LUSHABA	APPLICANT
AND	
STEEL AND HIRE INTERNATIONAL (PTY) LTD	RESPONDENT

CORAM

C. PARKER - JUDGE

J. YENDE - MEMBER

N. MANANA - MEMBER

For the applicant : MR. A. SHABANGU

For the respondent : MR. M.I. MAZIYA

R U L I N G

A point in limine was raised by the Respondent in its Reply to the applicant's application.-

The point in limine was set out in the following terms-

The dispute in this case was reported to the Labour Commissioner well after the expiry of six months contrary to section 57(3) of the Industrial Relations Act, No. 1 of 1996.

This matter has, therefore, not been dealt with or reported in accordance with Part VII of the Industrial Relations Act, No. 1 of 1996 contrary to the requirements of the Industrial Court Rules.

It must be pointed- out from the outset that the "Industrial Relations Act" referred to in the Industrial Court Rules, 1984 (the Industrial Court Rules), is the 1980 Act which has been superseded by the Industrial Relations Act, 1996 (Act No. 1 of 1996) (the Act), mentioned in the first paragraph of respondent's preliminary objection and quoted above.

It is the provisions of the present Industrial Relations Act (the Act) which are to be applied.

Indeed the section 57(3) mentioned in the first paragraph of respondent's preliminary objection is contained in Part VIII of the Act, entitled "Disputes Procedure". It was Part VII in the repealed 1980 Act. Thus any reference in the Industrial Court Rules to "Part VII of the Act" must be taken to refer to Part VIII of the 1996 Act (the Act) which, as I have said, is to be applied.

It is not in contention that the dispute which gave rise to the present application was reported to the Labour Commissioner on 21 February 1997 (see paragraph 4 of the Certificate of Unresolved Dispute, dated 29 April 1997, annexed to the Application for Determination of an Unresolved Dispute).

In the absence of any dispute of fact on this central issue in the point raised in limine, Mr. Maziya, counsel for the respondent and Mr. Shabangu, counsel for the applicant, argued the point on the ground of law only.

The pith and marrow of Mr. Maziya's argument is that the dispute which is the subject of the present application has not been reported or dealt with in accordance with Part VIII of the Act and therefore, in terms of Rule 3(2) of the

Industrial Court Rules, this Court cannot take cognisance of the application that has been brought before it.

The basis of Mr. Maziya's contention is that the dispute was never reported in accordance with Part VIII of the Act in that the period permitted by the Act for reporting disputes to the Commissioner of Labour had long lapsed. The fact that it was not reported within the time-limit stipulated by the Act, in particular under section 57(3), so the argument goes, means the dispute has not been reported or dealt with in accordance with Part VIII of the Act.

The result is, as Mr. Maziya submitted, this Court cannot take cognisance of the dispute as stipulated in Rule 3(2) of the Industrial Court Rules.

Section 57(3) of the Act provides -

"A dispute may not be reported to the Commissioner of Labour if more than six months have elapsed since the issue giving rise to the dispute first arose, but the Commissioner of Labour may, in any case where justice requires, and with the written approval of the Minister extend the time during which a dispute may be reported."

And Rule 3(2) of the Industrial Court Rules provides

"The Court may not take cognisance of any dispute which has not been reported or dealt with in accordance with Part VII of the Act."

According to Mr. Maziya, as can be gathered from para. 6.1 of the applicant's particulars of claim, the "issue giving rise to the dispute" which was purportedly reported to the Commissioner of Labour "first arose" in July 1995, i.e. 6 July when the applicant was arrested. And therefore, since the dispute was reported close to 18 months after the issue first arose, i.e. between 6 July 1995 and 21 February 1997, that

period is well beyond the period of six months stipulated in section 57(3) of" the Act.

For that reason, so Mr. Maziya submitted, the Commissioner of Labour acted ultra vires when he intervened and accepted the applicant's report of the dispute between him and the respondent, and therefore the intervention and acceptance of the report are void. For that reason, he continued, the dispute has not been reported or dealt with in accordance with Part VIII of the Act.

Mr. Maziya submitted that the Court should invoke the provisions of Rule 3(2) of the Industrial Court Rules and refuse to take cognisance of the application that was launched in this Court by the applicant.

As far as Mr. Shabangu is concerned, a key to the interpretation and application of section 57(3) lies in giving meaning to the words "since the issue giving rise to the dispute first arose." He referred the Court to the meaning of "issue" in the Concise Oxford Dictionary, 7th ed: "point in question; important topic for discussion; at variance or in dispute.'

Relying on the grammatical or ordinary meaning of the word "issue" as given in the Concise Oxford Dictionary, Mr. Shabangu maintained the dispute was properly reported to the Commissioner of Labour within the statutory time-limit. He takes the date on which the question of the applicant's entitlement to the items claimed in his particulars of claim annexed to the application arose as the critical date. In other words, the issue giving rise to the dispute that was reported to the Commissioner of Labour first arose when the applicant started to claim his entitlement to those items as aforesaid.

He stated that there was nothing in the papers before the Court to show or support Mr. Maziya's contention that the issue giving rise to the dispute first arose when the applicant

5

was arrested on 6 July 1995. For Mr. Shabangu, no issue arose then because the applicant did not make an issue out of his arrest.

Mr. Maziya's answer to that is that he agreed that the definition of "issue" as given in the Concise Oxford Dictionary is "point in question," but the dictionary does not say point in question that has been raised. So whether or not the applicant raised an issue with the respondent when he was arrested on 6 July 1995 has no bearing on the understanding of the word "issue" as used in section 57(3) of the Act.

Mr. Maziya maintained that the basis of the dispute is the event of 6 July 1995, because the. issue giving rise to the dispute should naturally come first in time sequence. It was the events of 6 July 1995 that form the basis for the applicant's claim, and therefore the basis of the dispute, he submitted.

Both Mr. Shabangu and Mr. Maziya agreed that an understanding of the word "issue"was crucial in understanding the clause in which it has been used in section 57(3) of the Act, namely "since the issue giving rise to the dispute first arose." It was also common cause during counsel's submissions that the word "issue" should be given its plain, grammatical meaning. I agree with that position.

As both counsel agreed, the Concise Oxford Dictionery gives as one of the meanings of "issue", "a point in question". To my mind this is the only meaning that is appropriate to the understanding of "issue" as used in the text of section 57(3) of the Act.

It is only when "issue" is preceded by the preposition "at", i.e. "at issue", that you find the following definitions: "under discussion; in dispute; at variance." (Concise Oxford Dictionary, 8th ed.) In his submission, Mr. Shabangu gave these definitions also as some of the meanings of "issue".

6

With respect, I do-not agree. The meaning of "issue" as "point in question" is rather apt as far as the relevant text of section 57(3) of the Act is concerned.

Having said that "issue" as used in section 57(3) means the point in question, and since, in my view,

"point" means "the significant or essential thing" (Concise Oxford Dictionary, 8th ed.) and "question" means "a problem requiring an answer or solution" (ibid.), the word "issue" in the text of section 57(3) of the Act means the significant matter (or thing) which was a problem and which required a solution.

It was when the applicant and the respondent could not find a solution that that problem gave rise to (i.e. "caused"; see Concise Oxford Dictionary, 8th ed.) the dispute that was purportedly reported to the Commissioner of Labour.

From the foregoing analysis, the clause "since the issue giving rise to the dispute first arose" in section 57(3) of the Act simply means, since the problem which caused the dispute first occurred".

And I agree with Mr. Maziya that "issue" should not be confused with "dispute"; "issue" must ex necessitate predate "dispute" as far as the above-quoted clause of section 57(3) is concerned, and so the two are different.

At this juncture I must decide when did the problem that caused or gave rise to the dispute first occur.

Mr. Maziya puts the date of the occurance to the events of July 1995, precisely of 6 July when the applicant was arrested and placed in custody. Mr. Shabangu places the date of the occurance to the date on which the question of the applicant's entitlement to the relief claimed in his particulars of claim (annexed to the present application) arose. With due respect, to maintain this point is to confuse "issue" with "dispute".

In any case, it must be noted that Mr. Shabangu does not relate the time the question of the applicant's entitlement arose to any particular date. With respect, to my mind, that is also a flaw in his submission.

With due respect, I cannot agree with Mr. Maziya either. The events of July 1995, in particular the arrest of the applicant on 6 July, are significant in the chain of subsequent events, but on 6 July no significant problem affecting the contractual relationship between the applicant and the respondent had arisen. In fact, in his final submission, Mr. Maziya appeared to have shifted his ground in support of either 18 August or 21 August 1995 as being the critical date.

In my view, the applicant's suspension was the significant problem that caused the dispute which was purportedly reported to the Commissioner of Labour. So the "issue giving rise to the dispute first arose" on 21 August 1995 within the meaning of section 57(3) of the Act. For this reason when on 21 February 1997 the applicant reported the matter to the Commissioner of Labour, he was time-barred.

In terms of section 57(3) he ought to have reported the dispute to the Commissioner of Labour within six months after 21 August 1995, i.e. on or before 21 February 1996. As the papers filed of record show, the applicant reported the dispute to the Commissioner of Labour 18 months after the issue which gave rise to the dispute first arose. This is definitely a degree of lateness the Court cannot condone.

By conciliating in the matter and by issuing the Certificate of Unresolved Dispute, the Commissioner of Labour in effect arrogated to himself alone the power to extend the time during which a dispute may be reported. This is a power he alone does not have. The minister's approval is indubitably imperative.

The procedure by which such an extension could properly be granted is laid down in section 57(3) of the Act. There is no evidence before the Court that such a procedure was

followed nor indeed that an extension was granted under section 57(3) of the Act.

In my view therefore the applicant was time-barred, and therefore the Commissioner of Labour should not have conciliated. The Commissioner therefore acted ultra vires Part VIII of the Act when he issued the Certificate of Unresolved Dispute. The Certificate is therefore null and void. It is my decision therefore that the dispute giving rise to this application has not been reported or dealt with in accordance with Part VIII of the Act.

In his point raised in limine the respondent maintains that since the dispute was reported to the Commissioner of Labour after the expiration of six months in breach of section 57(3) of the Act, the matter has not been dealt with or reported in accordance with Part VIII of the Act. In that case in terms of Rule 3(2) of the Industrial Court Rules, this Court should refuse to take cognisance of the present application.

Rule 3(2) provides -

"The Court may not take cognisance ofany dispute which has not been dealt with in accordance with Part VII of the Act."

As I said earlier on in this judgement, "Part VII" referred to in Rule 3(2) must read Part VIII of the Industrial Relations Act, 1996 (the Act).

I have decided that the dispute has not been reported or dealt with in accordance with Part VIII of the Act. What remains to be determined is whether despite that, this Court can still take cognisance of the dispute and proceed with the determination of the application on the merits.

Mr. Shabangu submitted that even if this Court decides, as I have decided, that the dispute has not been reported

or dealt with in accordance with Part VIII of the Act, this Court can still exercise its discretion and proceed to determine the matter on the merits under the powers given to the Court under section 15(1) of the Act. In support of this contention, Mr. Shabangu relied on the fact that Rule 3(2) uses the word "may" which must be read as permissive.

He submitted further that the breach of Part VIII was a technical irregularity which would not result in a miscarriage of justice if it was disregarded by this Court.

Mr. Maziya met this argument by arguing that the breach of Part VIII was not a matter of a technical irregularity, but it amounted to a contravention of the Act which this Court cannot simply ignore. On the question of the construction of "may" in Rule 3(2) of the Industrial Court Rules, Mr. Maziya argued that when "may" is followed immediately by "not" as it is the case in the text of Ruie 3(2), then "may" should rather be read as imperative or maodatory.

With respect, I find myself having a serious difficulty with Mr. Shabangu's contention that the breach of Part VIII is only a technical irregularity which this Court may disregard. To my mind the fact of the dispute not having been reported or dealt with in accordance with Part VIII of the Act is not a technical irregularity within the meaning of section 8(1) of the Act. The breach is in contravention of the Act and therefore cannot be ignored. The provisions of section 57(3) are peremptory and not directory, considering the importance of the provision thereof in relation to the general object intended to be

secured by the Act.

The judgement in Swaziland Fruit Canners(pty) Limited v Phillip Vilakati' and Barnard Dlamini (Industrial Court of Appeal Case No. 2/87) is pertinent. There Hannah, C.J. had this to say (at p. 2) -

10

"Not every party to an industrial dispute is entitled to have the dispute determined by the Industrial Court. Looking at the matter generally, the policy of the Industrial Relations Act is that before a dispute can be ventilated before the Industrial Court it must be reported to the Labour Commissioner who is obliged to conciliate with a view to achieving a settlement between the parties.

Where a conciliation is successful, machinery exists for the agreement arrived at to be made an order or award of Court but where the dispute remains unresolved the Labour Commissioner is obliged to issue a certificate to that effect and then, and only then, may application be made to the Industrial Court for relief." (My emphasis)

The learned Chief Justica went on to state: "The role to be played by the Labour Commissioner. in terms of the statute is undoubtedly an important one" (loc.cit.). He then concludes: "The importance of the Labour Commissioner's role is such that the duties imposed by Part VII of the Industrial Relations Act should, in my view, be strictly observed." (loc.cit.) (My emphasis)

The above-quoted portions of the learned Chief "Justice's speech should guide and Influence my decision. It is only when a certificate of unresolved dispute has been issued by the Commissioner "and only then" can an application be made to the Industrial Court for relief. Since I have decided that the certificate issued by the Commissioner of Labour is null and void, it follows that an application cannot be made by the applicant to the Court for relief. As Hannah, C.J., said in Swaziland Fruit Canners, the duties imposed upon the Commissioner of Labour by Part VII (now Part VIII) of the Act "should ... be strictly observed."

11

I am fortified in my view by what Hannah C.J. said later on in his speech in Swaziland Fruit Canners (at 3). He said the effect of Rule 3(2) of the Industrial Court Rules is -
"to place a duty on the Industrial Court to satisfy itself that the dispute which the applicant seeks a decision has been reported and dealt with in accordance with Part VIII..."

And since, as I have stated, this Court is not satisfied that the dispute upon which the applicant seeks relief has been reported or dealt with in accordance with Part VIII of the Act, this Court has a duty not to take cognisance of the dispute.

In John Mdluli vs. Big Bend Sugar Estate, the effect of non-compliance with the dispute reporting procedure under Part VIII of the. Act came up for determination as a preliminary issue, as it has been in the present case. The Acting President of the Court stated categorically That "this Court would have had no hesitation in dismissing the application on the ground that the dispute reporting procedure was not followed." I have no reason to depart from this view. Of course, the Court in John Mdluli did not dismiss the applicant's application simply because, contrary to respondent's contention, and after it had ascertained what the true position was, the Court found that the dispute reporting procedure under Part VIII of the Act had in fact been followed.

From the foregoing reasons, the respondent's prayer' that this Court should not take cognisance of the dispute is granted. The applicant's application is dismissed.

There will be no order as to costs.

DR. COLLINS PARKER

JUDGE OF THE INDUSTRIALCOURT