THE HIGH COURT OF SWAZILAND

SWAZISPA HOLDINGS LIMITED

Applicant

And JONATHAN LANGWENYA

1st Respondent

THE PRESIDING PRESIDENT OF THE INDUSTRIAL COURT OF SWAZILAND

2nd Respondent

THE COMMISSIONER OF LABOUR, N.O.

3 rd Respondent

THE ATTORNEY GENERAL

4th Respondent

Civil Case No. 3179/2002

Coram	S.B. MAPHALALA - J
For the Applicant	MR. M. NSIBANDZE
For the Respondents	ADVOCATE VAN DER WALT
	(Instructed by Maphalala & Co.)

JUDGMENT

(23/04/2002)

This is an application for review. The order being sought is for the order of the Industrial Court in Case No. 115/2002, granted on the 21st May 2002 be and is hereby reviewed and corrected or set aside and costs of this application to be paid by the party or parties opposing the application.

The founding affidavit of one Howard Mabuza who is Human Resources Manager is filed in support thereto. Pertinent annexures are attached to the Applicant's papers. The 1st Respondent has filed an answering affidavit in opposition. The matter came for arguments in the contested motion of the 28th March 2003, where I reserved judgement. Following is my judgment in this matter. On the 13th March 2000, the 1st Respondent applied to the Labour Commissioner (3rd Respondent) for extension of time within which to report a dispute which appears to have arisen somewhere in 1997. On the 20th March 2000, the Labour Commissioner decided to intervene and called the parties to a meeting, during which the Applicant inter alia agreed to pay the 1st Respondent the salary claimed by him, which formed the subject matter of the dispute. On the 15th May 2000, the Labour Commissioner recommended that dispute be deemed to be reported in terms of Section 57 of the former Industrial Relations Act, 1996 and gave an extension.

On the 7th June 2000, the current Industrial Relation Act, 2000 came into operation, and repealed the 1996 Act.

On the 17th May 2001, the Industrial Court upheld a point in limine that the dispute was not reported in time, that only the Minister and not the Labour Commissioner could extend the time, that the intervention by the Labour Commissioner could only take place where no report of the dispute had been made, and that the Labour Commissioner therefore acted ultra vires by purporting to intervene.

On the 12th June 2002, the 1st Respondent re-applied to the Labour Commissioner for an extension. There is an internal memorandum wherein an acting Assistant Labour Commissioner states that their office made a mistake in intervening, and recommended that the "case" be rejected. This memorandum is dated the 21st August 2002. On the 21st May 2002, on the application by the 1st Respondent, under Case No. 115/2002 the Industrial Court orders the Labour Commissioner to grant extension of time. The Applicant was not cited as a party therein. This is the order which forms the subject matter of the current application. On the 5th July 2002, an internal memorandum wherein

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The Labour Officer recommended the granting of the application following the Industrial Court Order.

On the 5th July 2002, the Labour Commissioner granted the 1st Respondent a 29months extension, until August 2002.

The issue in dispute is that the Applicant seeks that the order granted by the Industrial Court on the 21st May 2002, be reviewed and corrected or set aside. There does not appear to be any written judgement, and the 2nd Respondent has apparently not dispatched his reasons, as called for in the notice of motion.

In the Book of Pleadings, the Applicant summarised its issues as follows:

1. Whether the Industrial Court in granting the order in case No. 115.2002 acted in accordance with Section 76 (6) of the Industrial Relations Act No. 1 of 2000;

2. Whether Section 76 (6) of the Industrial Relations Act was applicable in the circumstances;

3. Whether the Industrial Court may instruct the Commissioner of Labour to extend the period with which a dispute may be reported, and

4. Whether an extension of time was correctly ordered in the circumstances.

When the matter came for arguments both attorneys filed very comprehensive Heads of Argument and the court is highly appreciative to counsel for the industry shown in both sets of Heads. I shall in the main adopt the format followed by Mr. Nsibandze for the Applicant for convenience not that Miss Van Der Walt's Heads are of a lesser quality, but for the incisiveness in Mr. Nsibandze's Heads. Further Miss Van Der Walt conceded the main points raised by Mr. Nsibandze. This judgment is merely for purposes of the record.

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The application for extension of time was made under the auspices of Section 76 (4) of the Industrial Relations Act No. 1/2000 which reads, " A dispute may not be reported to the Commissioner of Labour if more than 6 months have elapsed since the issue giving rise to the dispute first arose, but the Commissioner of Labour may subject to subsection 5 in any case where justice requires extend the time during which a dispute may be reported".
Subsection 76 (5) reads:

"The Commissioner of Labour shall not have the power to extend the time in which a dispute may be reported where a period of 36 months has elapsed since the dispute first arose".

The 3rd Respondent considered the application for extension of time and declined to extend the time within which the dispute can be reported to him on the basis that a period of more than 36 months had elapsed since the dispute first arose. The 1st Respondent aggrieved by the decision of the Labour Commissioner (the 3rd Respondent), invoked his rights in terms of Section 76 (6) of the Industrial Relations Act which reads:

"Any person aggrieved by the decision of the Commissioner of Labour under subsection 4 may apply to the court and the court shall determine the issue, taking into account any prejudice that may be suffered by any one of the parties to the dispute", (my emphasis).
The 2nd Respondent granted an order in the following terms:

"That the 1st Respondent [3rd Respondent herein] is hereby directed to issue and/or grant the application for extension of time in the matter between Jonathan Langwenya and Royal Swazi Spa Holdings within 14days upon service of this order".

I agree with Mr. Nsibandze and this is also conceded by Miss Van Der Walt for the other side that the order of the 2nd Respondent was grossly irregular in the circumstances for the following reasons:

Section 76 (6) requires the court to;

i) "Determine the issue"

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ii) Determine the issue "taking into account any prejudice that may be suffered by anyone of the parties to the dispute". (my emphasis).

The irregularity arose in that the 2nd Respondent did not and could not have taken into account any prejudice that could be suffered anyone of the parties to the dispute in that the Applicant herein is clearly a party to the dispute which the 1st Respondent wishes to pursue but was not cited as a party and was not given any opportunity to place any possible prejudice that he may suffer due to the granting of the extension of time before the court.

Further, it would appear that Mr.Nsibandze is correct in his contention that the rules of natural justice required that before the extension of time which is in the form of an application for condonation could be granted, the Applicant who would be the defendant in any proceedings thereafter should be given an opportunity to oppose if it so wished to and state reasons why it was opposed to the granting of the extension of time. The case cited by Mr. Nsibandze that Shadrack Shabangu vs Nhlangano Casino Hotel Ltd Industrial Court Case No. 141/95 is authority to this proposition.

Furthermore, the 2nd Respondent also committed an irregularity in that it is clear that he did not apply his mind to the matter in that in terms of Section 76, the court "shall determine the issue". The issue before the Industrial Court was that the 1st Respondent was seeking that he be granted an extension of time within which he be allowed to report his dispute. It is common cause that the dispute first arose in July 1997. Had the 2nd Respondent applied his mind to the matter he would have realized that more than 36 months had elapsed since the dispute first arose and that in the circumstances the 3rd Respondent had no authority to grant the extension of time sought. By logical implication if the 3 rd Respondent has no authority to grant the extension of time than the 2nd Respondent has no authority either to grant the extension of time or order the 3rd Respondent to grant the extension of time.

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At the close of submissions Miss Van Der Walt urged the court to refer the matter back to the Industrial Court for that court to rehear the matter. Mr. Nsibandze agreed with this in view of the facts advanced above.

In the premise, the Applicant's order in Case No. 115/2002, that the extension of time be granted is set aside and further the extension of time granted by the Labour Commissioner consequent upon the order is also set aside.

The matter is referred back to the Industrial Court and that court to follow the full strictures of Section 76 (6) of the Industrial Relations Act No. 1 of 2000 more particularly to cite the Applicant in those proceedings.

The costs to follow the event.

S.B. MAPHALALA

JUDGE