IN THE INDUSTRIAL

COURT OP SWAZILAND

Held at Mbabane

Case NO. 71/90

In the Matter between;-

PIET BHEMBE. APPLICANT

And

SWAZILAND DAIRY BOARD RESPONDENT

RULING

This is an action in which the Applicant seeks an order of court awarding him severance allowance and damages in lied of re-instatement.

The Applicant was employed by the Respondent during or about 1979. On the 12th September, 1988 the Respondent dismissed the Applicant from its employment with effect from the 14th September, 1988.

On the 23rd August, 1989 the Applicant reported the dispute to the Labour Commissioner pursuant to Section 50 of the Industrial Relations Act. The dispute was reported more than 6 months since the issue giving rise to the dispute first arose contrary to Section 50(3) of the Industrial Relations Act.

In view of the contravention of Section 50(3) the Commissioner of Labour granted extension of the time during which a dispute may be reported to him with the written approval of the Minister and there are attached to the Notice of Application to Amend dated 22nd November, 1990 and marked "A" and "B".

The Respondent has raised a preliminary objection. The preliminary objection is that the "Labour Commissioner in granting an extension of time failed to observe the rules of natural justice in that he failed to give the Respondent an opportunity to make representations to him before he took , the decision,for authority the Respondent has referred the court to the judgement of the Honourable chief Justice Hannah in the case of Swaziland Fruit Canners (Pty) Limited vs Phillip Vilakati and Barnard Dlamini Industrial Court Appeal number 2/87.

The Labour Commissioner in his Replication affidavit filed into court on the 30th May 1991 under paragraph 6 concedes that the extension of time was granted without conducting a preliminary inquiry. In paragraph 7 of the same affidavit the Labour Commissioner further concedes he exercised his discretion to extend the time without observing the rules of natural justice. Mr. Flynn now submits that as a result

of the fact that the procedures were not complied with the case has not been dealt with in accordance with Part VII of the Act as required by rule 3 (2) of the Industrial Relations Act. That this court may not take cognisance of the dispute as it is clearly not properly before court.

This court must stress the fact that rule 3(2) of the Industrial Court Rules of 1984 states that the court may not take cognisance of any dispute and not shall not take cognisance of any dispute.

Mr. Flynn submits that this court must dismiss this application and may not give further directions because the case is not before court.

It is Mr. Flynn's submission that every provision of Part VII of the Act must be discharged before a. matter can be heard by court as shown by

Rule 3(2) Industrial Court Rules. Application is not before court as the dispute has not been dealt with properly and must be struck off the roll.

] That the court may not give directions so as to rectify what the Labour Commissioner has failed to do.

In reply Mr, Dunseith representing the Applicant submits that he concedes that in general he is in full agreement with the submission made by Mr. Flynn. This concession has properly been made. Mr. Dunseith submits that this court is required to investigate the granting of extension of. time by the Labour Commissioner in keeping with appeal number 2 of 1987 afore referred to. The court is empowered to set aside extension of time in the event that it is satisfied that the Labour Commissioner fialed to carry out the principles of natural justice.

He submits that the difficulty the Applicant has is that the Labour Commissioner himself concedes that the inquiry was irregular and that the Respondent was not given opportunity to make representations. This does not automatically mean that the Application is aborted. This court must first set aside the decision of. the Labour Commissioner and once the decision is set aside the certificate or extension of time falls away and the next step is that this application is misconceived and should be struck off.

Mr. Dunseith goes further and submits that the court must take cognisance of the dispute only in so far as the holding of the inquiry as to whether proper procedures have been observed. In making that inquiry the court has the power if necessary to refer matter back to Labour Commissioner. He referred us to Section 6(l) of the Industrial Relations Act.

He submits that if the Labour Commissioner has not made sufficient attempt to reach agreement and that this will include an attempt to resolve a dispute reported out of time Court is

Labour Commissioner.

Mr. Dunseith further referred to appeal No. 2 of 198? page 18 of the judgement and submitted that the court should lean in favour of granting the litigant a remedy rather than taking away an existing right. That the court cannot clearly take cognisance of a matter that has been improperly dealt with. That to dismiss the application would not necessarily prejudice the Applicant because such a dismissal would not be on the merit and have properly obtained a certificate of extension the applicant would return to this court. The court should remit matter back to the Labour Commissioner on the question whether or not certificate of extension of time should be issued. He finally submits that the point in Limine must succeed.

Mr. Flynn in answer submits that to state that the Extension of time is part of the reconciliation procedure is not correct. That Section 54 of the Industrial Relations Act sets out how conciliation commences that it commences when a dispute has been reported. When the Labour Commissioner starts or attempts to secure a settlement of the dispute after the receipt
of the proper report. The report itself does not have anything to do with the reconciliation. The Labour Commissioner performs a quasi judicial .

function in determining whether to extend time and it is quite separate from the process of reconciliation. Section 54 bears this out. Action on the report is reconciliation. The report is not part of the reconciliation.

He further submits that Section 6(1) of the Industrial Relations Act does not assist this court to ensure that the Labour Commissioner has properly fulfilled his role in reconciliation. That this matter is not properly before court and this Section cannot be used because the Section envisages the position where the provisions of Part VII of the Industrial Relations Act have been complied with and there are no technical contraventions of Part VII. That no further effort may be taken to clarify issues.

It will not be used where there have been contravention of Part VII.

Court cannot take cognisance of it.

Mr. Flynn submits that the dismissal of the application will not prejudice the Applicant. The proper route is to strictly reinforce Rule 3(2) industrial Court Rules. Applicant may still come back to court if Labour Commissioner decides to extend time or refer the question of extension to court.

The court has perused Rule 3(2) of the Industrial Court rules 1984 from which it will be noticed that the word used by the Legislature is not mandatory. This point can be noted in the Industrial Court Appeal No. 2 of 1987 in the case Swaziland Fruit Carpers (Pty) Limited vs Phillip Vilakati and Barnard Dlamini. While the Legislature did not make the observation of Rule 3(2) mandatory, the decision in the Industrial Court Appeal No. 2 of 1987 placed a mandatory requirement upon Rule 3(2) and this

court is bound to abide by the decision of the Industrial Court of Appeal No. 2 of 1987 as stipulated by Section 5(4) Industrial Relations Act.
The matter now before court has not been dealt with in accordance with the provisions of Part VII of the Industrial Relations Act. That is in granting the extension of time in which to report a dispute to the Labour Commissioner. The Labour Commissioner granted such extension in contravention of Section 50(3) Industrial Relations Act as read with the Industrial Court Appeal No. 2 of 1987. The Labour Commissioner did not grant the Respondent an opportunity to make representations to him before granting the extension of time. It was not for the Labour Commissioner to assume that such contravention would not result in the miscarriage of justice. The law required him to hear such representations from both parties before granting the extension of time. To do otherwise was to contravene the provisions of Part VII of the Industrial Relations Act.

In the present case the Labour Commissioner did not abide by the j provisions of Section 50(3) of the Industrial Relations Act. This court cannot take cognisance of this dispute pursuant to Rule 3(2) of the Industrial Court Rule 1984. The Applicants applications is accordingly dismissed and the point in Limine is sustained.

MARTIN S. BANDA

INDUSTRIAL COURT PRESIDENT