IN THE INDUSTRIAL COURT OF SWAZILAND

Held at Mbabane

In the matter of:- CASE NO. 129/91

SWAZILAND MANUFACTURING AND

ALLIED WORKERS UNION APPLICANT

and

SWAZILAND BOTTLING COMPANY

(PTY) LIMITED RESPONDENT

RULING

This is an application by the Swaziland Manufacturing and Allied Workers Unions in which they seek an order that the Respondent be interdicted from proceeding with their intended short time further calling upon the Respondent to show cause why this order should not be made final.

This application was initially presented before court as an urgent ex parte application. A perusal of the application showed that the interests of the Respondent would be affected and prejudiced if the application was allowed to be heard ex parte. This court decided that this matter be heard inter parte. It was then allocated for hearing on the 12th July, 1991.

Mr. Flynn representing the Respondent on the date of hearing said there were certain points of law he wished to move in limine before the Applicants representative proceeded to move his application. This he was entitled to do in law without filing any document into court raising the preliminary issue.

Mr. Flynn submitted that the point at the outset is that the Applicant seeks an interdict in terms of the notice of motion that Respondent be interdicted

with a short time arrangement. The Applicant seeks by reference to Rule 6(4) High Court Rules and alleges that this be read with Section 7 of the Industrial Relations Act. This Notice of Motion together with the affidavit was served upon the Respondent at 14.15 hrs yesterday afternoon. In the circumstances no affidavit has been filed by the Respondent. It was not necessary to file an affidavit to answer this application. It is common cause that certain employees have been put on short time. This is provided in Annexure B. Short time may be required as per collective Agreement Annexure B. This is what happened.

The Applicant has had various meetings with the Respondent and appears to dispute both the right of the Respondent to place the employees on short time and the genuiness of the reason. This appear to be matters in dispute. This is the background to this application. There is no evidence of the report of this matter to the Labour Commissioner. There is no evidence of conciliation and no evidence of a certificate that the dispute is unresolved. It is not relevant that we address the date when short time was to come into effect. The court is nowhere empowered to grant an interdict of the nature sought by the Applicant. To do so would be ultra vires. The Industrial Court is a creature of statute and if it is to issue interdict it must do so under a specific section of the Industrial Relations Act.

In terms of Section 5(1)(c) Industrial Relations Act. The Industrial Court may enjoin any organisation from taking any strike action or lock out. There is specific provision for interdict in relation to a strike or lock out, in the absence of such a section the court has no power. I refer to Section 17 of Magistrates Court Act which grants that court the right to interdict.

The South African Industrial Court has jurisdiction is certain circumstances to grant in certain circumstances an interdict or declaratory relief. That is to be found in Section 17(11)(a) Labour Relations Act. In both cases of that court and Magistrates there is specific provision for the granting of an interdict.

There isn't a general power granted to the Industrial Court in Swaziland.

This is logical given the structure of the Act and the intention of the legislature in the Industrial Relations Act. The Act is said to be an act to provide for, the collective negotiation of the terms and conditions of employment for the settlement of disputes. The High Court may be approached for interdicts on proper grounds.

In fulfilling that intention of the legislature it has specifically provided in Part VII of the Act which it has made mandatory. The Legislature has not provided for an immediate procedure. Its only when the conciliator in the name of the Labour Commissioner has conciliated that this court may be approached except in the circumstances of a strike or lock out.

Section 58(2) Industrial Relations Act. Where a dispute is unresolved either party may make application to or the Labour Commissioner may refer matter to court. It seems to me that there is no provision for short circuiting that. The rules provide for the method in which the application is to be made. The Applicant comes on a notice of motion for an interdict which the court is not empowered to grant. The Application has not been dealt with in terms of the rules. There clearly appears to be a dispute but that has not been reported. The Applicant is asking this court to adjudicate on the dispute which obviously exists without going through the disputes proceedures and that is not permissable. If an employee is given one month notice of termination of employment. An employee may say it is unfair. Such employee would come to this court to interdict. That is not the intention of the Legislature. That is not the proceedure. An important pointer as to what is a proper application before this court will b e found in Rule 2 of the Industrial Court Rules definition of application and these are the strike and lockout.

The Application is made in terms of Rule 4. The Applicant says it is acting

in terms of Rule 6(4) High Court Riles as read with Rule 10 of the Industrial Court Rules. There is this provision presumably because where there is no procedure the Industrial Court rules are not detailed. But where there is procedure as in disputes this court cannot refer to High Court Rules. This cannot import the powers of the High Court it may use with such adaptations the procedures and not import the power. One has to look at the power in the Industrial Relations Act. There is no power except in certain circumstances. The others are largely remedial powers in the Industrial Relations Act.

Section 7 Industrial Relations Act provides for the payment of money. If a dispute is referred to this court after a report then the court can hear. Assume that there is a dispute as there may well be then in terms of Section 7 the report must be made to the Labour Commissioner he must conciliate if he is unsuccessful then he issues a certificate of unresolved dispute. Section 7 should be read with Part VII of the Act. It is important to note that it is exercised where the determination of the relative rights under the Act. Then the court may adjudicate and make an order under Section 7. What' the Applicant is doing in the present application is circumventing short circuiting the provisions of the act. The court cannot by way of interdict determine what is a dispute first it does not have the power to interdict and secondly it would be ignoring the disputes proceedure.

In reply Mr.'' Motsa representing the Applicant submitted that the notice served to the Respondent is quite clear that the Respondent should today submit a reply. This is in terms of Rule 4(3) of the Industrial Court Rules. The

Respondent has a duty to file a reply if at all there is any. That reply is there to guide the court and everyone concerned with the position of the Respondent. My Learned friend is free to make whatever lengthy submission he may feel like making. Today Respondent was to submit a reply. The court

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can fix a date for submission in terms of Rule 5. There is no point in making a submission when there is no paper showing the attitude of the Respondent on the written application. The position is that it is not obligatory for the Respondent to reply. He may not reply. The Respondent is not empowered not to reply because of a point in Limine. If it is a point of law it does not mean a party is not entitled to make preparations for it. I submit that the court fixes a date for argument because there is no reply.

Mr. Flynn in answere submitted that I am astonished by my Learned friends submission he seeks an interim interdict today. He is asking for relief today. I have argued that he is not entitled to such interdict and the Respondent does not have to file a reply. Applicant has not made out a case in these papers it is totally irregular for the order that it seeks because the court is not empowered to make such order. In those circumstances we have put an argument that this application be dismissed for the reasons that I have given. In fact the proceedings are so irregular that they should be dismissed with costs. We are not obliged to reply. The Respondent is entitled to say that from the bar. In the circumstances I would apply that this application be dismissed with costs.

This then is the position that this court is being called upon to resolve. Does this court have an application pursuant to the Industrial Relations Act pending before it for decision. Is the application of the Applicant one such application awaiting for determination of the court.

Rule 3(2) Industrial Court Rules 1984 states and we quote: -

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"(2) 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".

That is the court shall n ot adjudicate on a matter that has not been ventilated through the Labour Commissioner- That is every dispute must first be reported to the Labour Commissioner who should then conciliate. If his efforts at conciliation are abortive he then issues a certificate of unresolved dispute. Only then are parties permitted to appear before court after filing their requisite application.

In the present application no dispute has been reported to the Labour Commissioner. We have not been referred to any authority that empowers this court to hear and grant the relief sought by the Applicant.

This court cannot take cognisance of this matter for it has not complied with Part VII of the Industrial Relations Act.

This application is accordingly dismissed. The court cannot grant the interdicts sought by the Applicant.

MARTIN S. BANDA

INDUSTRIAL COURT PRESIDENT