IN. THE INDUSTRIAL COURT OF SWAZILAND

Held at Mbabane — Case No. 140/91

In the Matter between:-

SWAZILAND MANUFACTURING AND

ALLIED WORKERS UNION — APPLICANT

and

SWAZILAND BOTTLING COMPANY (PTY)LTD — 1ST RESPONDE

and

MANCON SWAZILAND (PTY)LTD — 2ND RESPONDENT

RULING

This is an application by the Applicant in which they seek that the court determine the following question

(1) Whether the Respondents are entitled to implement the short time work in terms of Section 10 of the Collective Agreement between Applicant and Swaziland Bottling Company (Pty)Ltd dated 27th May 1991 whilst the dispute between them is in the process of being resolved by the Labour Commissioner in terms of Section 50 and 57 of the Industrial Relations Act 1980.

In an affidavit appended to the application and deposed by one Sipho Motsa and dated 31st July, 1991. Paragraph 9 thereof alludes that this application is being brought under Section 53(1) of the Industrial Relations Act 1980.

Mr. Flynn representing the Respondent has raised a preliminary issue. The issue is that this is not an application which can be dealt with by the court summarily. An application under Section 53 deals with an application seeking the court to determine the nature of the dispute. That this Section cannot be used for determining the dispute itself. That for an application to be heard by this court a certificate of unresolved dispute has to be issued by the Labour Commissioner in its absence this court cannot take cognisance of the dispute.

Mr. Shilubane for the Applicant has argued that the Applicants are approaching the' court on the basis that the matter has been reported to the Commissioner of Labour. It is his submission that Applicants under Section 53 only have to prove that the matter has been reported to the Labour Commissioner That the Applicants under Section 53 do not need a certificate of unresolved dispute before they can approach the court.

When Mr. Shilubane was referred to Industrial Court Appeal 2/87 the case between Swaziland Fruit Canners (pty) Limited vs Phillip Vilakati and Barnard Dlamini he submitted that the case on appeal concerned a party challenging whether a certificate was issued validly or not. It was he further submission that the Applicants were approaching the court on the, basis that the matter has been reported.

Mr. Flynn in answer submitted that Part VII of the Industrial RElations Act provides that Labour Commissioner shall conciliate. That Section 53 does not provide an alternative method for approaching the court. That the Applicant will have the right to approach the court as an urgent application once they are armed with the certificate of unresolved dispute. It is Mr. Flynns submission that Section 53 applies

where the nature of dispute is in question. That to suggest that parties can come to court through Section 53 after reporting but before issue of a certificate of unresolved dispute would be an absurdity. He submitted that Section 53 entitles the court to determine the nature of the dispute where the parties are not agreed.

We must very firmly advise litigants to read Industrial Court Appeal 2 of 1987 properly and place a proper interpretation upon it. The effect of Appeal 2 of 1987 is that a party that has reported a dispute pursuant to Part VII of the Industrial Relations Act cannot come to court to seek relief until the Labour Commissioner has issued a certificate of unresolved dispute. The effect of this appeal is that when the Labour Commissioner has not issued a certificate of unresolved dispute the Industrial Court has no jurisdiction to hear such

application. The Industrial Court cannot take cognisance of such application pursuant to Rule 3(2) Industrial Court Rules.

It may well be that a dispute does exist between the parties but this court can only hear such application after the Commissioner of Labour has issued a certificate to the effect that the dispute is unresolved.

Section S3 does not grant the Applicant the alternative to ignore the provisions of Part VII of the Industrial Relations Act. Section 53 can only be utilised by the parties where they are not agreed as to the nature of the dispute and thus would like the court to determine the dispute. Once the dispute has been determined by Court it falls to be processed as provided by Part VII of the Act. Failure to ensure that a dispute is processed as provided by Part VII disqualifies such application from being heard by Court. That is if the dispute is not handled in accordance with Part VII the Industrial Relations Act the Court cannot take cognisance of it for it has no jurisdiction.

The present application has not complied with the provisions of Part VII of the Industrial Relations Act. It is accordingly dismissed. We now come the question of costs. Respondents have applied that the Applicants be condemned in costs because their application is frivoulous and vexatious. We decline to make such an order. It is clear that this application was made pursuant to a wrong interpretation having been placed upon Section 53. This court should not frighten litigants with the threat of being condemned in costs. Costs should only properly be awarded where it is clearly shown that the application is frivoulous and vexatious. The present application is not per se frivoulous or vexatious it dangerously borders on being one. An order for costs is accordingly denied.

M.S. BANDA

INDUSTRIAL COURT PRESIDENT

8/8/91