IN THE INDUSTRIAL COURT OF SWAZILAND

Held at Mbabane CASE NO. 74/91

In the matter of:-

ALPHUS MKHWANAZI APPLICANT

and

SWAZISPA HOLDINGS LIMITED RESPONDENT

RULING

This is an application in which the Applicant alleges that the Respondent accused him of having attempted to steal some meat. He denied the allegation. However the Respondent proceeded and terminated the services of the Applicant. Applicant prays that the Court as remedy orders the Respondent to pay him:-

(1)	6 months wages as compensation	E 3600.00
(ii)	1 month wage in lieu of notice	600.00
(iii)	52 days additional notice	1250.00
(iv)	130 days severance pay	3250.00
		524.25
(v)	20.97 days leave pay	E 9274.25

The Respondent in its plea raised an issue in Limine.

Respondent objects to this matter coming before the Industrial Court on the following grounds.

(1) The provisions of Part VII of the Industrial Relations Act of 1980 have not been complied with, that is there was no attempt to conciliate by the Labour Commissioner hence the matter is improperly before the court.

Mr. Jele representing the Respondent submitted that in this matter the Respondent filed an objection in Limine with regards to the Applicants claim. The contents of the objection are as follows. The provisions of Part VII of Industrial Relations Act have not been complied with hence the matter is improperly before court.

In terms of the certificate of unresolved dispute attached to the Applicants claim under number 4 thereof the Labour Commissioner states that the reasons which prevented a settlement in his opinion are shown as 4(a)(b). The implication of the Labour Commissioners report is that there was no reconciliation. _The reasons are that the company refused a union official to represent the Applicant. It is our submissions that matters coming before this court should be matters that have been dealt with in accordance with Part VII of the Industrial Relations Act. In this regard I would like to refer the court to Section 54(l) Industrial Relations Act.

It is our submission that this particular piece of Legislation imposes a duty upon the Labour Commissioner to try and conciliate between the two parties who are at logger heads and if that is not possible the matter

is referrred to the Industrial Relations Court. The significance of this duty was highlighted by the High Court in the Industrial Court of Appeal No. 2 of 1987.

In this particular case the Labour Commissioner did not conciliate between the two parties. This matter is before court without the parties having been afforded an opportunity to determine whether they could settle or not.

3

It is our submission that the matter should be remitted to the Labour Commissioner for reconciliation. In that way unnecessary litigation will be. avoided.

It is common cause that conciliation takes place between the parties in dispute. Where an Applicant does not belong to a trade union movement or such is not recognised by a company which he works for. That particular union does not become a party to a dispute and as such the Respondent have no obligation to deal with or entertain a representative of such union at that particular stage.

Matter is improperly before court in terms of the Industrial Relations Act and the rules of the court. The matter cannot come before court unless proper conciliation has been effected.

In terms of the rules of the court Rule 3(2) Industrial Court Rules of 1984. In order not to deny the Applicant a remedy the matter should be remitted back to the Labour Commissioner. It could be a part of the solution in that he would shed light on it. That the Court should invoke Section 6 of the Industrial Relations Act by referring this matter back to the Labour Commissioner.

In reply Mr. Motsa representing the Applicant submitted that the issue raised by the Respondent is more a matter of fact than law. This court has before it a certificate of unresolved dispute. This is prima facie evidence that there has been a dispute reported to the Commissioner of Labour and conciliated. Whoever feels that there has been no conciliation. The onus rests on him to prove that there has been no conciliation. In this case the Respondents has not proved that. This court remains with no alternative but to accept the certificate as genuine and dismiss the point in Limine.

4

Alternatively I would say that the Applicant reported the dispute to the Commissioner of Labour on the 16th July 1990. My instructions are that a meeting was held by a Labour official with both parties for the purposes of reconciliation on the 30th July 1990. I would refer to Section 54(1) Industrial Relations Act. That Section gives a fixed number of days by which a Commissioner of Labour is required to have conciliated. That number of days is 14. I also refer to Section 54(2). If one looks at the days the 30th of July 1990 is the last day by which the Commissioner of Labour was supposed to have conciliated. Section 54(2) is clear that there may be an extension of time provided that both parties request him in writing so to extend the time. This means that if either party would like the time extended and the other party was not interested in having the time extended the Commissioner of Labour remains with no power whatsoever to extend the time.

In this case nobody including the Respondent suggested an extension of time.

Going along with that process the Commissioner of Labour invoked Section 58(1) Industrial Relations Act. The Commissioner of Labour had no other route to follow other than invoking this Section. It is significant that the Respondents point in Limine is on the basis that the Commissioner of Labour did not make any attempt. It is common cause that an attempt was made. I am not interested in pursuing whatever frustrations that may have been made to the attempt for conciliation.

An attempt was made but was frustrated by the Respondent. I submit that the court dismiss the Respondents point in Limine and the case take its normal course. The court cannot remit this case back to the Commissioner of Labour because it does not meet the requirements of Section 6 Industrial

Relations Act. Conciliation is something that has to be there. Conciliation

5

is essential and obligatory but in spite of that it is not expected to be always there.

There is a fixed number of days and secondly there is a provision which says the Commissioner of Labour may not conciliate. The opportunity was availed but frustrated. If the Respondent was eager to see this matter conciliated he could have approached the Applicant for extension of time. There is nothing the Commissioner of Labour could have done.

In answer Mr. Jele submitted that an extension of time during the process of conciliation can only be sought wherein there is the possibility of ccontinuing with the conciliation. It is inconceivable that Applicant should now submit that Respondent should have sought extension of time when conciliation had not commenced. The facts are conciliation did not take place in view of the presence of certain people of whom Respondent objected to. Further in terms of Section 6 Industrial Relations Act the last part of the Section empowers this court to remit matter back to the parties and Labour Commissioner. This is a classical example in which no sufficient attempt has been made to reach an agreement by way of conciliation provided for under the Industrial Relations Act.

At this stage the court would like to refer to Industrial Court Appeal 2/87 In the matter Swaziland Fruit Canners (Pty) Limited and Phillip Vilakati and Barnard Dlamini a judgement of Chief Justice Hannah. At page 1 last paragraph the Honourable client Justice said and we quote:

"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 ventillated before the Industrial Court, it must be reported

6

to the Labour Commissioner who is obliged to conciliate with a view to achieving a settlement between the parties".

page 2 Last paragraph proceeds and we quote:-

"Generally speaking if a party comes before the Industrial Court armed with an unresolved dispute certificate signed by the Labour Commissioner the court would be entitled to assume that all is in order and that the proceedures set out in Part VII of the Act have been properly observed". "However it is always open to one or other of the parties to challenge the presumption of regularity and when that occurs the Industrial Court has a duty imposed upon it by Rule 3(2) of the Industrial Court Rules 1984 to ascertain what the true position is".

At page 3 first paragraph the judgement proceeds and we quote :-

"Where the proper observance of the provisions of Part VII is called in question the Industrial Court has to determine the matter before it can proceed to the merits of the dispute."

We decided to quote extensively from this judgement because we were struck with the impression that Applicants representative is not aware of this judgement. Applicants representatives submission are all answered in this judgement that we have referred to.

The fact that an Applicant is armed with a certificate of unresolved dispute does not preclude the other party from challenging the regularity of the presumption and when that occurs the Industrial Court has a duty to ascertain the true position.

In the present case a report was made to the Labour Commissioner who attempted to effect are

conciliation.

7

The Labour Commissioner issued a certificate of unresolved dispute and under item 4(b) of the certificate is the following endorsement and we quote:-

"4b Conciliation failed because the company could not allow union official to represent applicant advancing the argument that in view of the fact that they have not recognised them it would not be proper to have them as representatives in this particular instance".

The question which springs to mind is did the Commissioner of Labour conciliate. The Law says he is obliged to conciliate with a view to achieving a settlement between the parties. In the present case did he conciliate as by law required. The Labour Commissioner if I understand him correctly is saying conciliation has failed because the Respondent did not allow a union official to represent the applicant. Was there an act of conciliation. It seems to me that only the Applicant made representations to the Labour Commissioner the Respondent was not heard. Was this conciliation.

It is the decision of the court that the Labour Commissioner in the present case did not conciliate. He attempted to bring the parties together but did not conciliate as he is by law obliged to do. In the circumstances Part VII of the Industrial Relations Act has not been complied with. The court cannot consequently take cognisance of this matter pursuant to Rule 3(2) of the Industrial, Court Rules 1984.

In the interests of Justice it is ordered that this matter be remitted back to the Labour Commissioner for him to conciliate pursuant to Section 6(1) Industrial Relations Act.

8

The Respondent has accordingly been successful in its application.

MARTIN 'S. BANDA

INDUSTRIAL COURT PRESIDENT