

IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO.32/2000

In the matter between:

ANN MALAY

APPLICANT

And SWAZILAND RAILWAY

RESPONDENT

CORAM

KENNETH NKAMBULE:

JUDGE

DAN MANGO:

MEMBER

GILBERT NDZINISA:

MEMBER

MR. E. HLOPHE:

FOR APPLICANT

MR. Z. JELE:

FOR RESPONDENT

RULING ON POINTS IN LIMINE

22/9/00

The respondent has raised a point in limine in the following terms:

That the procedure contemplated under Section 41(3) of the Employment Act encompasses a report being made directly to the Industrial Court by the Labour Commissioner and the court acting upon the report to determine the manner in which the matter is to be disposed.

Section 41 of the Employment Act provides:

"(1) Where an employee alleges that his services have been unfairly terminated or that the conduct of his employer towards him has been such that he can no longer be expected to continue in his employment, the employee may file a complaint with the Labour Commissioner, whereupon the Labour Commissioner, using the powers accorded to him by Part II shall seek to settle

1

the complaint by such means as may appear to be suitable to the circumstances of the case.

(2) Where the Labour Commissioner succeeds in achieving a settlement of the complaint, the terms of the settlement shall be recorded in writing, signed by the employer and by the employee and witnessed by the Labour Commissioner. One copy of the settlement shall be given to the employer, one copy shall be given to the employee and the original shall be retained by the Labour Commissioner.

(3) If the Labour Commissioner is unable to achieve a settlement of the complaint within 21 days of it being filed with him, the complaint shall be treated as an unresolved dispute and the Labour Commissioner shall forthwith submit a full report thereon to the Industrial Court which will then proceed to deal with the matter in accordance with the Industrial Relations Act.

Now it is clear that under our labour law in Swaziland there are two ways of addressing labour related complaints.

The one which is common and widely used is provided by Section 57 and 58 of the Industrial Relations Act 1/1996. The second one is provided by the above quoted Sections of the Employment Act, 1980.

The procedure provided by Section 41 of the Employment Act is more appropriate to an employee who does not wish to use the dispute reporting procedure provided by Section 57 (1) of the Industrial Relations Act-Respondent's reply is that it is not correct for the Labour Commissioner to directly bring the matter to court because he has no legal or substantial interest in the matter. He states that Rule 4 (1) states that it shall be the parties (applicant) who will bring a matter to court.

Mr. Jele's objection is that only the Commissioner of Labour shall treat a complaint which is filed with him as an unresolved dispute. Section 41 (3) states that if the Commissioner is unsuccessful the Commissioner should treat the complaint as an unresolved dispute. Thereafter he should submit a full report to the Industrial Court. The Industrial Court will then determine the matter in accordance with the Industrial Relations Act This is only

2

after the Labour Commissioner has submitted a full report on the matter to the Industrial Court.

The question which immediately arises is as follows:

Has the Commissioner of Labour submitted a full report of the proceeding in his office to court for determination? If the answer to this question is to the affirmative then the court can entertain the matter. But if it is not then the court cannot entertain the matter.

On papers filed of record we have a document entitled "CONCILIATION REPORT IN ACCORDANCE WITH SECTION 41 (3) OF THE EMPLOYMENT ACT 1980".

Looking at the report it is clear that this is a report of the proceedings which took place at the Labour Office preceded over by the Senior Labour Officer.

It came to court via the applicant's attorney. It was not presented by the Commissioner of Labour in terms of Section 41 (3) of the Employment Act.

Parker Judge, as he then was had this to say in ERIC KHUMALO VS USUTHU PULP CO. Case no. 70/96 at page 14 "In my view it is only when, under the Employment Act, the Commissioner of Labour has submitted a full report that the court may 'proceed to deal with the matter in accordance with the Industrial Relations Act.' If there is no full report submitted by the Labour Commissioner, as I have decided there is none in the present case the court cannot proceed to deal with any matter in accordance with the Industrial Relations Act, because logically there is no matter to deal with."

It is clear that the Commissioner of Labour never submitted a full report of the complaint to the court for determination as provided by Section 41 (3) of the Act. It is a peremptory requirement of the Employment Act that before the court proceeds to deal with a matter brought to it under Section 41 of the Act, there must be before it a "full report" on the unresolved dispute forming the basis of the matter - which has been submitted to it by the Commissioner of Labour.

This approach, though supported by authorities has practical problems. Firstly, the Commissioner of Labour is made to submit a report to court unaccompanied by an application in terms of Rule 4 (1) of the Industrial Court Rules.

3

Secondly, by mere submission of this report he becomes part of the proceedings in court and thereby an interested party in the proceedings.

My view would be that this section should be amended. Sub-section 3 must be amended such that it gives a right to any of the parties to submit the report to court on application.

However, until this is done the law as stated in Swaziland Liquor Distributors and Dlamini must be followed. From the foregoing it is my conclusion that the respondent's point in limine is well founded and is therefore upheld.

Accordingly the order of this court is that the applicant's application is dismissed. No order as to costs.

Members concur.

KENNETH P. NKAMBULE

JUDGE (INDUSTRIAL COURT)