

IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 91/2000

In the matter between:

ROBERT KHUMALO AND

2 OTHERS

APPLICANTS

and

SALES HOUSE

RESPONDENT

CORAM

KENNETH NKAMBULE:

JUDGE

DAN MANGO:

MEMBER

GILBERT NDZINISA:

MEMBER

MR. D. MSIBI:

FOR APPLICANTS

MR. S. DLAMINT:

FOR RESPONDENT

RULING ON POINTS IN LIMINE

13/10/00

The respondent has raised two objections in limine in the following terms:

1. The matter sought to be brought before this court is improperly before court because the procedures of Section 41 of the Employment Act have not been followed.
2. This court does not have jurisdiction to preside over the additional notice pay component of the claim because such component was not reported as a dispute for conciliation to the Labour Commissioner, hence it was not conciliated upon.

Applicant's representative contends that the matter is properly before court. He states that the provisions of Section 41 of the Employment Act were complied with. He has referred the court to Annexure 4 and Annexure 5 of the applicant's application.

1

He stated that the matter was conciliated upon and a report was made and copies issued to the parties. He further stated that in the past the court has been entertaining such applications such that this has become customary.

On the second point he states that the additional notice is a statutory requirement and it need not be conciliated upon.

The procedure laid down in Section 41 (3) is as follows:

The Commissioner should have made an attempt to achieve a settlement between the employer and the employee using the powers vested in him by Part II of the Act (See Sub section 1). If the Commissioner is

unsuccessful, he and no one else - should treat the complaint as an unresolved dispute. Thereafter the Commissioner should immediately submit a full report of the unresolved dispute to the Industrial Court. The Industrial Court will then determine the matter in accordance with the Industrial Relations Act. This is only after the Commissioner has submitted a full report to the Industrial Court. (See Zeth Mfanuzile Dlamini and Swaziland Liquor Distributors and another Industrial Court Case No. 19/97 per Parker Judge at page 6.

From Annexure 4 and 5 of the applicant's application it is clear that applicant reported a complaint in terms of Section 41 (1) to the Labour Commissioner. It is also clear that the matter was conciliated upon by the Labour Commissioner without success. It is also clear that a report was issued regarding this matter. However, the report was not directed to the Industrial Court in terms of Section 41 (3) of the Employment Act.

With respect I cannot accept Mr. Msibi's submissions that in the past Section 41 (3) of the Act had been contravened until this had become a custom. He has not endeavored to prove that indeed such contravention of the law was condoned by the court.

I have not come across any authority which states that judicial officers are law makers. All that I am supposed to do as a judicial officer is to interpret the law and not to amend it. Amending the law is the sole prerogative of the legislature.

I come to the conclusion that; in my view it is a mandatory requirement of the employment act that before the court proceeds to deal with a matter, there must be before it a FULL REPORT on the unresolved dispute forming

2

the basis of the matter, which has been submitted to it by the Commissioner of Labour.

Because of the aforementioned reasons it is not necessary to deal with the second point of law. The first point in limine succeeds.

The court makes no order as to costs.

Members concur.

KENNETH NKAMBULE

JUDGE (INDUSTRIAL COURT)

3