IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 78/05

In the matter between:

ANDREW McCARTER APPLICANT

and

HUB SUPERMARKET (PTY) LTD RESPONDENT

CORAM

N. NKONYANE:ACTING JUDGE

DAN MANGO:MEMBER

GILBERT NDZINISA:MEMBER

APPLICANT: MR. P.R. DUNSEITH

FOR RESPONDENT: ADVOCATE D. SMITH INSTRUCTED BY CLOETE HENWOOD DLAMINI ASSOCIATED

R U L I N G 30.09.05

The applicant brought an application for the determination of an unresolved dispute in terms of Section 85 (2) of the Industrial Relations Act No. 1 of 2000.

The applicant in its statement of claim stated that he was summarily terminated on the 29th November 2004 on grounds of mismanagement and insubordination. He further stated that his termination was unfair and

unreasonable as it was contrived and motivated by malice because he exercised his lawful right to claim his bonus entitlement from the respondent.

The applicant therefore claims: -

(a) *Payment of terminal benefits,*

(b) *Payment of balance of bonus for the years ended 30th June 2000 to 2003,*

(c) *Balance of incentive bonus payable for the financial year ended 30th June 2004,*

(d) *Payment of pro rata bonus for the year ended 30th June 2005,*

(e) *Payment of maximum compensation for unfair dismissal and*

(f) *Costs.*

The application is opposed by the respondent. The respondent filed a reply wherein it raised a special plea and also filed a conditional counter claim.

The respondent raised a special plea of lack of jurisdiction by this court to entertain the claims in prayers b) c) and d) as these were based on specific performance of a commercial contract and/or claims for damages arising from a breach thereof.

In the event that the court finds that it has jurisdiction, the respondent's counterclaim is that the applicant pays back to it a sum of E267,497.06 being overpayment of the applicant of profit bonuses during the period 1st September 1999 until 29th November 2004.

In response to the counterclaim by the respondent, the applicant also raised a point in *limine.* The applicant stated in its papers that the respondent

never reported a dispute pertaining to the alleged overpayment and that therefore this court was barred from taking cognizance of such a matter which was not reported as a dispute to the Labour Commissioner in terms of Part VIII of the Industrial Relations Act of 2000.

The court is therefore being called upon to make a ruling whether or not it has jurisdiction to entertain prayers b) c) and d) of the applicant's claims, and secondly, whether or not it has jurisdiction to entertain the respondent's counterclaim.

Both counsel filed written heads of argument. The court will record its appreciation as these helped to elucidate and narrow down the issues.

The court will address the points of law raised as follows:-

1. *Lack of jurisdiction to entertain the applicant's claim and*
2. *Lack of jurisdiction to entertain the counterclaim.*

1. **Lack of jurisdiction to entertain prayers b), c| and d):-**

It was argued on behalf of the respondent that this court has no power to entertain prayers b) c) and d) of the applicant's claim as these were claims for specific performance. It was argued that these prayers were based on specific performance of a commercial contract and/or claim for damages arising from a breach of the contract. It was argued that the relief could only be obtainable in a common law court.

On behalf of the applicant it was argued to the contrary that this court does have jurisdiction to entertain all the claims of the applicant, including prayers b) c) and d). It was argued that the contract between the parties was not different from any other contract of employment. It was argued that the bonus part of the contract was just a term of contract meant to be an incentive and to cause the applicant to work harder.

It was conceded on behalf of the respondent that the common law position that a master cannot be compelled to retain the services of an employee who had been wrongly dismissed, has since been amended by statute. It was argued that the position has not, however, changed with regards to orders for the payment of wages.

With respect, the court does not agree with counsel's submissions. This court does have the power to order an employer to make any payment due to the employee in terms of his or her contract of employment. This power of the Industrial Court is in terms of Section 16 (9) of the Industrial Relations Act, No. 1 of 2000 as amended. That section reads as follows: -

"*Compensation awarded under this Section is in addition to, and not in substitution for, any severance allowance or other payment payable to an employee under any law, including any payment to which an employee is entitled under his or her contract of employment* or an applicable collective agreement" (my emphasis).

In the present case the application seeks an order for compensation for unfair dismissal. In terms of this subsection, this court when making the award for compensation, in the event that he is successful, the court is empowered to make an order for any other payment payable to the

applicant under any law and any payment to which he is entitled under his contract of employment with the respondent.

Section 16 of the Industrial Relations Act, therefore puts the question of jurisdiction beyond any doubt. It is important to note that that section is headed "Remedial powers of the court in cases of dismissal, discipline or other unlawful disadvantage." (my emphasis).

The terms of the contract of employment are not in dispute. If therefore the applicant was not paid some of the bonuses or was not paid the correct amount thereof, he was clearly disadvantaged and had the right in terms of Section 16 (a) of the Industrial Relations Act to approach this court for a remedy.

The court was referred by the applicant's counsel to the case of ***THOMAS LAWLOR ANDREWS v BAGSHAW HARRIS AND ASSOCIATES (I.C.) CASE NO. 172/99.*** Although in that case the issue of jurisdiction did not arise, the court was referred to it to show that this court had in the past dealt with a matter involving bonus entitlement. In that case the applicant was also claiming maximum compensation, terminal benefits and payment of accrued bonus entitlement.

Furthermore, in that case, like in the present one, the applicant was contending that the respondent falsely manipulated the calculations so as to deprive the applicant of the bonus to which he was entitled.

The court was also, referred to the case of **MGIJIMA *v EASTERN CAPE APPROPRIATE TECHNOLOGY UNIT AND ANOTHER 2000 (2) SA 291 (TRANSKEI HIGH COURT).*** In that case the applicant brought an application for an unfair dismissal before the High Court. He claimed that the dismissal was unfair because of an alleged procedural unfairness. He argued

that his Constitutional right to procedural fairness had been violated and therefore was entitled to bring that labour issue before the High Court. The question to be decided was whether the High Court or the Labour Court had jurisdiction to entertain the matter.

Van ZylJ, at page 302 held as follows:-

"*It is sufficient to state at this stage that labour disputes covered by the provisions of the Act and for which specific dispute resolution procedures have been created, which includes conciliation/arbitration and the Labour Court as an integral part thereof, is a 'matter' that is to be determined exclusively by the Labour Court(my underlining).*

On page 304 the Judge quoted with approval a statement by **DIJKHORST J. IN THE CASE OF INDEPENDENT MUNICIPAL AND ALLIED TRADE UNION v NORTHERN PRETORIA METROPOLITAN SUBSTRUCTURE AND OTHERS 1999 (2) S.A. 234 (T)** at page 239 that,

"*It was the intention of the Legislature that a specialized set offora should deal with labour-related matters. To this end it established an interlinked structure of, inter alia, Trade Unions Employers, Trade Unions Employers' organization, a variety of Councils, the Commission for Conciliation, Mediation and Arbitration (CCMA) and the Labour and Labour Appeal Courts ...*"

It seems clear to the court that, like the creation of the Labour Court in South Africa, it was also the intention of this country's legislature that a specialized set of fora should deal with labour related matters. These fora

include the Conciliation, Mediation and Arbitration Commission (CMAC), the Industrial Court and the Industrial Court of Appeal.

It was also argued on behalf of the respondent that the contract between the parties was commercial in nature and not related to any dispute or dismissal. It was argued that there was no dispute on the terms of the contract, but the dispute was on implementation as the applicant was saying that the respondent misrepresented the figures.

This argument will be dismissed by the court as it was clearly casuistic. The applicant's claim, inter alia, is for the payment of balance of bonus monies. It was open to him to explain to the court how the underpayment arose, and he said it was due to the respondent's manipulation of the figures on which the bonus was to be calculated. That occurred during the subsistence of the employer - employee relationship between the parties.

From the foregoing observations, the court will come to the conclusion that this court does have the jurisdiction to hear the claims in prayers b), c) and d) of the applicant's application.

2. <u>Lack of Jurisdiction to entertain the counterclaim:-</u>

It was argued on behalf of the applicant that the court does not have jurisdiction to hear the respondent's counterclaim. Mr. Dunseith argued that since the issues raised in the counterclaim were not reported to the Labour commissioner as a dispute, this court was barred from hearing the counterclaim.

Mr. Smith argued to the contrary on behalf of the respondent, that this court has jurisdiction to hear the counterclaim. He submitted that at common law

when a plaintiff submits himself to the jurisdiction of the court, the court is entitled to deal with all disputes between the parties. He further argued that the claim for overpaid profit bonuses was a dispute between the same parties and in respect of the same subject matter.

The principles of the common law referred to by Mr. Smith are trite. They do not however supercede the rules of this court. In terms of the rules of this court and in particular rule 3 (2) states "the court may not take cognizance of any dispute which has not been reported or dealt with in accordance with Part VII of the Act."

Part VII of the Act has reference to the repealed Industrial Relations Act No.4 of 1980 dealing with the procedure of bringing an application to court. The present section is Part VIII of the Industrial Relations Act No. 1 of 2000. In terms of the provisions of Part VIII of the Act, a dispute is referred to the Court after it has been referred to the Labour Commission, transmitted to CMAC for arbitration and a certificate of unresolved dispute issued.

In the present case, there was no evidence that the issue of overpaid profit bonuses was reported to the Labour Commissioner and dealt with by a CMAC Commissioner and a certificate of unresolved dispute issued.

The issues in dispute as they appear from the annexed certificate of unresolved dispute were:-

> ***UNPAID INCENTIVE BONUS***
>
> ***COMMISSION UP TO 30/06/04***
>
> ***SEVERANCE ALLOWANCE, NOTICE PAY, ADDITIONAL NOTICE PAY, PRO-RATA BONUS FROM 01/07/04 TO 31/12/04, LEAVE***

PAY AND 26 MONTHS MAXIMUM COMPENSAITON FOR UNFAIR DISMISSAL

A similar point arose and was addressed in the case of **CATHERINE UDOIDUNG v INSTITUTE OF MANAGEMENT DEVELOPMENT (I.C.) CASE NO. 83/98.** In that case Mr. Dunseith who was representing the applicant raised preliminary objections to the respondent's claim in reconvention. The court had to decide whether it should take cognizance of the issue of the claim in convention which had never been reported to the Labour Commissioner as a dispute, and in respect of which a certificate of unresolved dispute had not been issued.

The court in that case dismissed the respondent's claim in reconvention after holding that it was in clear disregard of the provisions of Part VIII of the Act. The Court was also referred to the case of **SWAZILAND FRUIT CANNER (PTY) LIMITED v PHILLIP VILAKATI AND BARNARD DLAMINI (I.C.A.) CASE NO.2/87.** The Industrial Court of Appeal on pages 1-2 pointed out that.

> "*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 ventilated before the Industrial Court, it must be reported to the Labour Commissioner who is obliged to conciliate with a view to achieving a settlement between the parties. Where the conciliation is successful machinery exists for the agreement arrived at to be made an order or award of court but where the dispute remains unresolved the Labour Commissioner is obliged to issue a certificate to that effect <u>and then, and onlu then, may application be made to the Industrial Court for relief.</u>" (my emphasis}*

The Industrial Court of Appeal judgement was referred to in the *Catherine Udoidung case.* Parker J. in the Catherine case at page 2 also pointed out that,

> "*And in our view it does not matter the least whether 'the dispute' relates to a claim made by an applicant or a claim in reconvention made by the respondent in answer to the applicant's claim.*"

It follows therefore, in the light of the above authorities that the applicant's objection to the respondent's counterclaim should be upheld and the counterclaim dismissed.

Taking into account all the above factors, the Court will make the following ruling:-

1. ***THE RESPONDENTS SPECIAL PLEA IS DISMISSED.***
2. ***THE APPLICANTS OBJECTION IS UPHELD.***
3. ***NO ORDER FOR COSTS.***

The members agree.

N. NKONYANE
ACTING JUDGE - INDUSTRIAL COURT