IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE **CASE NO. 19/2007**

In the matter between:

SAMUEL FANYANA SIKHONDZE **Applicant**

and

WILLIAM BARRY ROCHAT t/a
MALKERNS UNDERTAKERS **Respondent**

CORAM:

P. R. DUNSEITH: PRESIDENT

JOSIAH YENDE: MEMBER

NICHOLAS MANANA: MEMBER

FOR APPLICANT: W. MKHATSHWA

FOR RESPONDENT: B. GULE

J U D G E M E N T - 07/03/2007

1. The Applicant has applied to court for determination of an unresolved dispute, claiming against the Respondent for:

1.1. compensation for unfair dismissal;
1.2. notice pay;
1.3. leave pay;
1.4. overtime;
1.5. additional notice pay;
1.6. severance allowance

2. The application is supported by a certificate of unresolved dispute issued by the Conciliation, Mediation and Arbitration Commission ("CMAC"). The certificate characterises the nature of the dispute as 'unfair dismissal', and lists the issues in dispute as :

2.1. overtime;

2.2. notice pay;

2.3. arrear wages for 3 months.

3. In describing the reasons why the dispute could not be resolved, the Commissioner records on the certificate that the Applicant alleged that his dismissal was procedurally and substantively unfair but the Respondent refused to pay the Applicant the amount claimed.

4. The Respondent has raised points *in limine* and asked for the application to be dismissed. One of the points *in limine* was misconceived and abandoned at the hearing, but the remaining point can be summarised as follows:

4.1. *Ex facie* the certificate issued by CMAC, the issues of notice pay, additional notice pay, severance allowance, and compensation for unfair dismissal were never conciliated upon at CMAC;

4.2. The Industrial Court may not take cognisance of any dispute which has not been dealt with in accordance with the conciliation procedures prescribed in part VIII of the Industrial Relations Act 2000;

5. The certificate clearly includes notice pay as one of the issues in dispute. Section 33 of the Employment Act 1980 prescribes the statutory notice to be given on termination of an employee's service. For an employee who has completed more than two years of service, notice is calculated as to one month plus an additional four days for every completed year of service after the first year. This additional notice over and above one month is often referred to as 'additional notice', but it is merely a component in the calculation of the total statutory notice to which an employee is entitled. The reference in the certificate to 'notice pay' includes so-

called 'additional' notice pay.

6. An employee who has completed two years of service is entitled to payment of a severance allowance in the event that he is unfairly dismissed - **see section 34 of the Employment Act 1980.** Also, if the Industrial Court finds that a dismissal is unfair, the court may order the employer to pay compensation to the employee - **see section 16(1)(c) of the Industrial Act 2000.** The Applicant reported a dispute concerning his allegedly unfair dismissal, and this dispute was conciliated at CMAC, as appears ex *facie* the certificate.

7. The certificate of unresolved dispute issued in terms of section 85(1) of the Industrial Act 2000 is required to certify the reported disputes that remain unresolved after conciliation. There is no statutory requirement that the certificate should list the *claims* that arise from the unresolved disputes. Notwithstanding the inept drafting of the certificate filed of record, the court is satisfied that the claims objected to by the Respondent all arise from disputes that were reported by the Applicant, conciliated upon by CMAC, and certified as unresolved. In the premises, the court may take cognisance of the Applicant's claims.

9. The Respondent has not pleaded over on the merits. The Applicant's counsel urged the court to refer the matter to *ex parte* trial, in the event that the points *in limine* are dismissed. The Respondent's counsel has prayed for leave to file the Respondent's Reply. Although it has become the practice in the Industrial Court for Respondents to file a Reply on the merits and include any preliminary points of law in such Reply, there is no rule of court to that effect. In fact, if the rules of the High Court are applied, as provided by Rule 10(a) of the Rules of the Industrial Court, there is no need to plead over on the merits when preliminary objection to the jurisdiction is raised by way of exception (see rule 23(4) of the High Court Rules). The court would be reluctant to bar the Respondent from defending the matter when he wishes to do so, merely because the Respondent has failed to observe an unwritten rule of practice. No prejudice will be suffered by the Applicant if the Respondent is placed on terms to file his Reply, save a relatively insignificant delay in enrolling the matter on the civil hearing list.

10. The court makes the following order:

(a) The Respondent's points in limine are dismissed;

(b) The matter is postponed to the 21st March 2007 for the Respondent to file its Reply on the merits;

(c) The Respondent is to pay the costs arising from its raising of the points *in limine.*

The members agree.

PETER DUNSEITH

PRESIDENT OF THE INDUSTRIAL COURT