IN THE HIGH COURT OF SWAZILAND

Civ. Case No. 1872/96

In the matter between:

Sibongile Nxumalo

vs

Attorney General

Teaching Service Commission

Accountant General

Coram: S.W. Sapire, ACJ

FOR THE APPLICANT A. SHABANGU

FOR THE RESPONDENT ADV. WISE

JUDGMENT

(25/9/96)

The Plaintiff is a teacher. She has brought an application against the Defendants who are her employers in which she claims payment of salary withheld from her in respect of the period of her absence during the recent teachers strike. The Government claims that it is not obliged to pay the Plaintiff for the period that she did not teach while, the Plaintiff's case is that she did not teach during the relevant period because there were no pupils to teach. They were instructed not to attend school while the strike lasted. The plaintiff maintains that she came to the school where she is employed but was not able to deliver her services through no fault of her own.

In other words she says that she did not participate in the strike but validly tendered her services.

The point presently raised by the defendants is that this court has no jurisdiction to entertain the Plaintiff's claim by reason of the provisions of section five of THE INDUSTRIAL RELATIONS ACT, 1996 (Act No of 1996). This section reads as follows:-

"Jurisdiction

5.(1) The Court shall have exclusive jurisdiction to hear, determine and grant any appropriate relief in respect of any matter properly brought before it including an application, claim or complaint or infringement of any of the provisions of this Act, an employment Act, a workman's compensation Act, or any other legislation which extends jurisdiction to the Court in respect of any matter which may arise at common law between an employer and employee in the course of employment or between an employer or employers association and an industry union, between an employer or employers' association and an industry Union, between an employers' association, an industry union, an industry staff association, a federation and a member thereof."

In Donald C Mills - Odoi v Elmond Computer Systems (Pty) Ltd. Civ. Case No. 441/87 Dunn AJ (as he then was) held that the effect of Section 5(1) of The Industrial Relations Act of 1980 (the predecessor of the Act) was not to oust the jurisdiction of courts other than the Industrial Court in respect of matters specified in the Act which then governed.

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In Swaziland Development and Savings Bank v Swaziland Union of Financial Institutions and Allied Workers and Ano. Civ Case No. 1172/90 Dunn J (as he had then become) confirmed the ruling he had given in the earlier case.

The basis of the decision is the premise that, until a specific matter was actually before the Industrial Court, in the sense of one of the parties to the litigation having commenced proceedings in that Court, the jurisdiction of the Industrial Court was not exclusive, and any of the parties between whom a litigious Issue had arisen was free to choose the forum in which the matter was to be fought. Once, however, one of the parties exercised an election to bring the matter to the Industrial Court, and the matter was before that court, the provisions of Section 5 removed any jurisdiction any other court may have had to hear and deal with the matter, and the Industrial Court's jurisdiction which it until then had shared with other courts was not exclusive to it.

The wording of Section 5 (1) of the 1980 Act is different from the wording of the Act. It may be conjectured that the wording of the corresponding section in the Act may have been used to overcome the effect of the decisions to which I have just referred. It was argued by Mr. Wise who appeared for the Defendants that the change of wording meant that this court was not bound on the principles of stare decicis by the earlier decisions. Implicit in this argument is that the Legislature intended all matters involving claims disputes and differences between employers and employees, and their respective associations and unions, to be brought before the Industrial Court. The wording of the two sections is certainly different, but I doubt that the differences justify a departure from the decided cases on that ground alone.

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In framing the section of the present Act the legislature has retained the words "before it" with reference to the Industrial Court, in relation to those matters in which it is to have exclusive jurisdiction. In the Mills-Odoi case it was from the use of these words that Dunn J. deduced that the exclusivity of jurisdiction given to the Industrial Court would only become effective when a litigant bought his case in that court. I can find no significant difference between, the words "The Court shall have exclusive jurisdiction in every matter properly before it under this Act...", found in the 1980 Act, and the words "The Court shall have exclusive jurisdiction to hear.. in respect of any matter properly brought before it..." found in the Act. In both cases the criterion for exclusivity can be read to be whether or not the particular matter is before the Court. It follows that the change in the wording of the section would not in itself justify not following the precedents to which reference has been made. The interpretation of the Section, adopted by Dunn J, leads, however, to such anomalies, that with due respect, it must be re-examined.

Acting on the principles of Stare Decicis a court will not depart from the ratio decidendi of the judgment in a previous case decided in the same court unless the latter court is convinced that the earlier decision is clearly wrong. I must also bear In mind that the earlier decision has stood unchallenged for some years, and has presumably been acted upon on many occasions since it was handed down. Now to adopt a different interpretation of the section, will undesirably, introduce an element of uncertainty. These considerations notwithstanding, I must not follow a decision which has adopted an interpretation of the section which appears not to give effect to the intention of the legislature and which leads to jurisprudential anomalies.

The most important of the anomalies which comes to mind is that on the interpretation of the Mills - Odoi case, until one of the parties actually institutes proceedings in the Industrial Court, the Industrial Court, the High Court and possibly the Magistrates' Court have concurrent jurisdiction. The method and basis for deciding cases in the Industrial Court is, however, different from that in the other courts.

An important difference is that in terms of section eight of the new Act the Industrial Court is not bound by the rules of evidence or procedure which apply in civil proceedings. The same section also provides that such court may disregard any technical irregularity "which does not or is not likely to result in a miscarriage of justice". The outcome of a case may therefore depend on the forum which is chosen.

It cannot have been intended by the legislature that a plaintiff or applicant as dominus litus should have a choice, after the dispute had arisen, not only of court, but also of the law which is to apply in his case.

As far as I am aware the jurisdiction of a specialised court is, invariably made dependant on jurisdictional facts including the subject matter of the issues it is to try. Income Tax courts, Admiralty Courts, and Water Courts are created to deal with cases only in their speciality. Their jurisdiction is limited to entertaining only those cases within their allotted subject matter, and without exception the jurisdiction of the other courts of the land in respect of those matters is excluded. The creation of an Industrial Court, the definition of its jurisdiction as to subject matter, and the use of the word "exclusive" in section 5(1) are indications giving rise to an inescapable inference that the legislature intended to establish a special court which alone,

to the exclusion of all other courts, would deal with what may loosely be referred to as "labour matters", inelegantly defined in the section, where Labour Law would be applied. Broadly speaking Labour Law is to be understood as, the common law of master and servant as expanded and otherwise modified by Industrial Legislation.

The words "properly brought before it" are not to be read in the context as meaning pending cases regularly instituted. In the context of the Act as a whole the adjectival phrase can only refer to those cases, which, having regard to their jurisdictional facts involve issues governed by labour law as defined in the section itself, and which fall within the ambit of those matters reserved for decision by the Industrial Court. In such cases the Industrial Court alone has jurisdiction.

Any uncertainty occasioned by not following the precedent is overshadowed by the elimination of the anomalies introduced by the interpretation of Section 5(1) of the Act, I accordingly find myself unable to follow the decision in Donald C. Mills-Odoi v Elmond Computer Systems (Pty) Ltd. and find for the defendants on the point in limine taken.

The wording of section 5(1) of the Act is clumsy. The intention of the legislature is obscured by fractured language and lack of clarity in thought and expression. All this notwithstanding, Applicant's cause of action is one of a category of matters reserved for the exclusive jurisdiction of the Industrial Court. This court accordingly has no jurisdiction to entertain the claim made in her application.

The application is accordingly dismissed with costs.

S.W. SAPIRE

ACTING CHIEF JUSTICE