IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE CASE NO 80\96

IN THE MATTER OF:

JEREMIAH

MNGOMEZULU APPLICANT

AND

TYRE AND BATTERY RESPONDENT

RULING

The Respondent has raised a point in Limine couched in the following terms; 'The matter sought to be brought before this Honourable Court was not reported or dealt with in terms of Part VIII of the Industrial Relations Act No 1 of 1996 in that;

1.1 .The issue giving rise to the dispute first arose on May 22, 1995 when the Applicant informed the Respondent that he would only be able to return to work in December and he was told that such was unacceptable to the Respondent and he left.

The purported report was finally made on February 19,1996 which was 8 months and 27 days later contrary to Section 57(3) of the Industrial Relations Act of 1996 which provides that a report must be made within 6 months.

1.2.The court ,therefore, may not take cognisance of this matter in view of Rule 3(2) of the Industrial Court Rules of 1984 which states that the court may not take coni since of any dispute which has not been reported or dealt with in accordance with Part VIII of the Act.

1.3.Wherefore the Respondent prays that this Court should refuse to take cognisance of this matter.'

Initially the Respondent did not desire to lead evidence oral evidence to establish and prove the point raised in Limine. It sought concession from the Applicant that in fact the issue giving rise to the dispute first arose on 22 May 1995 when he the Applicant .informed the Respondent that he would only be able to return to work in December, and was told that such was unacceptable to the Respondent and the Applicant purportedly left.

The Applicant was adamant that the date on which the issue giving rise to the dispute first arose was in December 1995 when the Applicant having recovered from his ailment reported for duty and was told for the first time by the Respondent that his services had been terminated .

It was in these circumstances that the Respondent decided to lead the evidence of its witnesses to prove the point raised in Limine.

The evidence of PW1 Dawn Squires the manager of the Respondent was that on the 12th March 1995 Applicant went on leave. He was to come back on the 26th March 1995. He did not come back.

He returned on 22nd May 1995. He said he was sick, the spirits were worrying him. He was being treated in South Africa. He said the person treating him had indicated that the might be back in December 1995. PW1 asked the Applicant to produce a medical note. He did not produce any. PW1 informed the Applicant that she could keep his job open until July 1995 but not December 1995. The Applicant did not say anything he just got up said good bye and went out. He did not come back until the 18th December 1995. PW1 did no reach an agreement with the Applicnat on the 22nd May 1995.

It was PW1 one's evidence that on 27th March 1995 she was introduced to the Applicants mother.

PW1 explained to the applicants mother the if he was sick he would need to produce a sick note from the doctor where he was being treated. The evidence of PW2 Marble Xaba the Assistant Manager and Accountant of the Respondent is that the Applicant went on leave in March and returned in May 1995. PW2 translated the discussion between PW1 and the Applicant from English into Siswati according to PW2 the manager PW1 did not allow the Applicant to go and return in December.

The evidence of the Applicant is that in March 1995 he went on leave. While on leave he fell sick. And according to him on the 27th March when he was to resume duty he sent a message through his cousin Tebo Ndzimandze to report that he was sick. He eventually recovered in December 1995. He reported for duty and was informed that there was no work for him and that since July 1995 there had been no work for him. According to the Applicant he had met PW1 in the presence of PW2 before December to inform them about his state of health. He informed them that he was still sick and asked that they wait for him until he came back. PW1 told him that they will wait for him but in his absence will hire temporal staff. Applicant submitted exhibit P1 to his employer a medical certificate dated 22nd January 1996 in which the doctor stated and we quote "Nature of Illness" I don't have any proof of consultation at that time. He claimed to have been admitted in hospital. He resume duty on 27/4/95.

Applicant said he is not aware that in exhibit P1 the hospital denies having consulted him. He submitted exhibit P1 to his employer as proof of consultation. He does not know how the doctor wrote exhibit P1. The Applicant stated that he reported for work on the 20th December 1995. He was told there no work. The same day he went to report a dispute to the Labour Commissioner. When Applicant was informed that according to the report the dispute was reported on the 19th February 1996. His reply was that this was the second report. The first one was cancelled because he had arrived late for a conciliation meeting and found that PW1 had left. The evidence of Tebo Ndzimandze a witness of the Applicant is that PW1 told him that she would wait for the Applicant but did not indicate how long.

It is not in dispute that Applicant proceeded on leave in March 1995 and was expected to report back for duty in March 1995. He did not. He sent his cousin in the company of his mother to

inform his employer that he was sick. In May 1995 he personally went to see his employer. It is not in dispute that the employer agreed to wait for him. What is in dispute is the period of time that Applicant was allegedly informed his employer would wait for him. He says the employer told him they would wait until December 1995. The employer says that they were prepared to wait for him until St. July 1995. The duration of the time that the employer was prepared to wait for the Applicant is hotly in dispute.

The employer says there was no agreement that Applicant should report for duty in December 1995.

For the resolution of the point in Limine it is important that there be a determination of whether the parties did green that on the 22nd May 1995 the applicant would report for duty in December 1995 or whether the employer did state that it was prepared to wait for him until St. July 1995. The employer

states that there was no agreement and that Applicant left without agreement. The Applicant states that there was agreement that he reports for duty in December 1995.

It is interesting to note that in support of his case the Applicant introduced exhibit P which clearly states that the doctor does not have any proof that he was consulted by the Applicant. However exhibit P is immaterial at this stage since there is no dispute that the Applicant had reported his inability to resume duty after the expiration of leave.

There is no dispute that he sent his cousin in the company of his mother to report his ill health. It is also no in issue that on the 22nd May 1995 the Applicant reported at his employers work place and that his continued absence from work was with the knowledge of the employer and with its tacit approval or permission. Thus there is no need for him to show that his absence was with permission of his employer.

The Applicant then says that he reported the dispute on the 20th December 1995 immediately he was informed that there was no job. The report of dispute shows that the report was made on the 19th February 1996. The parties are agreed though that a report was indeed made to the Labour Commissioner and as a result no evidence was called from the Labour Commissioner. The point in Limine raised by the Respondent is that the report of dispute of the Applicant was made 8 months 27 days after the issue giving rise to the dispute first arose. If being the Respondents case that the dispute first arose on the 22nd May 1995.

On the evidence before court can it clearly with a great sense of clarity be said that on 22nd May 1995 there was any agreement or disagreement between the parties. Can it be said that the Applicant approached the Respondent and sought permission that he report in December 1995 for duty because of alleged ill health. Is it similarly clear from the evidence that the Respondent having heard the request for permission did grant such request. Did the Respondent inform the Applicant that it was prepared to wait for him until the St. July 1995 . Did the Respondent tell the Applicant that it was prepared to wait for the Applicant until December 1995 and that in the meantime it would engage temporal staff to fill his position. We ask these questions because the evidence of PW1 is that she was prepare to wait until St. July 1995. The Applicant on the other hand in his evidence says that the Respondent was prepared to wait for him until December 1995.

In this atmosphere of uncertainty as regards what was agreed between the parties that is whether there was an agreement was to wait for a specific period of time.

The court will have to look at the actions of the parties to determine what was agreed that it is true in agreement with the actions or what was not agreed in view of the controversy of what and what was not agreed. For the Respondent it says it expected the Applicant to report for duty on the St. July 1995. When the Applicant did not report for duty on the St. July 1995 what steps did it take. What did it do to bring to the attention of the Applicant that look we had agreed and had indicated to you that we were prepared to want for you up to the St. of July 1995. The St. of July 1995 has come and gone.

You have not reported for duty as agreed. You are in breach of our agreement. We are proceeding to employ someone else in your position. Was any documentary or oral message sent to the Applicant by the Respondent registering its discovery over the conduct of the applicant vis a vis their alleged agreement.

This information or evidence of this position if it does exist has not been brought to the attention of the

court. Speaking for ourselves when the St. July 1995 came and the Applicant did not report for duty we would have expected the Respondent to have taken the necessary steps to inform the Applicant and to draw his attention that on the 22nd May 1995 when he called upon it he was only granted time up to the St. July 1995 and that since he had failed to report for duty his employment had thereby become terminated. We say so because the evidence of PW1 is that when the Applicant reported on the 22nd May 1995 he said he was sick that the spirits were worrying him and that he was being treated in South Africa. The Applicant is further alleged to have told PW1 that the person treating him had indicated that he might be back in December 1995. PW1 had allegedly informed the Applicant that she could keep his job open until July 1995 but not December 1995. PW1 had stated before court that the Applicant did not say anything he just got up said good bye and went out and that PW1 did not reach any agreement with the Applicant on the 22nd May 1995.

From the piece of evidence it would appear to us that there was neither an agreement no a disagreement. The Respondent it appears to us did not take the necessary initiative at the meeting on the 22nd May 1995 to inform Applicant that it would not wait until December 1995. It is our considered view that thus would have helped the Respondent and would have supported their position in the argument that the issue giving rise to the dispute first arose on the 22nd May 1995. As it is this point is not clear. It was left to doubt. The minds of the parties do not appear to have been on the same wave length. That is the parties do not appear to have been aware that they had disagreed. The only point that appears to have been agreed on is that permission for more time had been granted. From the evidence before court the Applicant believed that he had secured permission to report for duty in December 1995 reported for duty on the 20th December 1995. It was on the 20th December 1995 that for the first time he learned that he had lost his job. It was on this date that he was informed that he lost his job in July 1995 for failure to report for work. Immediately he was given this information he reported a dispute with the Labour Commissioner. No clear out evidence for the Respondent has been put before court showing that the issue ever arose on the 22nd May 1995. The actions of the Applicant that is his reaction is in agreement with his position that he only became aware that he had lost his job on the 20th December 1995.

In our humble view the issue giving rise to the dispute between the parties first arose on the 20th December 1995 and not earlier. The Applicant swiftly thereafter made the requisite report of dispute.

This report was made within the statutory time limit. It was acted upon by the Labour Commissioner within the permitted time frame. The report was dealt with in accordance with Part VIII of the Industrial Relations Act of 1996. It did not breach the provisions of Rule 3(2) of the Industrial Court Rules of 1984. The Court does have jurisdiction to entertain it and will take cognisance of it. The prayer that the Applicants application be dismissed is hereby refused.

MARTIN SAMSON BANDA

PRESIDENT OF THE INDUSTRIAL COURT