IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE CASE NO. 268/99

In the matter between:

JOSEPH MATSEBULA APPLICANT

and

SWAZI SPA HOLDINGS RESPONDENT

CORAM:

NDERI NDUMA: PRESIDENT

JOSIAH YENDE: MEMBER

NICHOLAS MANANA: MEMBER

MR. P. THWALA: FOR APPLICANT

MR. M. SIBANDZE: FOR RESPONDENT

RULING

12.12. 2000

The Respondent raised the following objection in limine to the Applicant's Application for determination of an unresolved dispute brought in terms of Section 65 of the Industrial Relations Act No. 1 of 1996.

The Applicant reported the dispute personally contrary to Section 57 (1) of the then 1996 Act since there was at his workplace an active and recognised organisation namely the Swaziland Hotel and Catering and Allied Workers Union (SHCAWU). That the Applicant fell within the bargaining unit of SHCAWU and ought to have instructed it to report the dispute on his behalf.

It is not in dispute that the Applicant reported the dispute personally. It is trite that under Section 57 (1) of the 1996 Act, an employee could not lawfully report a dispute where there was an active recognised organisation.

Where there was a violation of Section 57 (1), in terms of rule 3 (2) of the Industrial Court rules, the court lacked jurisdiction to entertain unresolved disputes brought before it without strict adherence to the procedure thereof.

The Industrial Relations Act, 2000 has since repealed the 1996 Act and Section 112 (1) headed 'Transitional Provisions' reads thus:

"112(1) All legal proceedings pending before the court established under the repealed Act shall, on the day this Act comes into force, be continued by the court established under this Act as if they had been initiated under it,

2. Any process, matter or thing initiated under the provisions of the repealed Act shall, on the day this Act comes into force, be continued as if it had been initiated under this Act".

It was submitted by Mr. Musa Sibandze for the Respondent that only process, matter or thing properly and lawfully initiated under the 1996 Act could now be deemed to have been lawfully and properly initiated under the 2000 Act.

This means that any process, matter or thing initiated, not in conformity with the 1996 Act could not be deemed in terms of Section 112 to have been properly initiated under the 2000 Act.

It follows that a defect that had the result of ousting the jurisdiction of the court to hear the matter cannot be condoned so as to confer retrogressively the necessary jurisdiction to determine the matter, Mr. Sibandze added.

On the contrary, Mr. Alfred Thwala argued that unless the Respondent can show what prejudice it would suffer if this matter is proceeded on in terms of the new Act, then it would be unjustified for the court to refer the matter to the Commissioner of Labour for proper procedures to be followed.

Furthermore, in terms of Section 76 of the Industrial Relations Act, 2000 an employee is perfectly entitled to report a dispute individually even where there is an active, recognised organisation and even if the employee falls within that organisations bargaining unit.

It is essential to recognise that, with the repeal of the 1996 Act, the 'old' court under that Act was abolished and a 'new' court established under the 2000 Act.

As concerns procedural matters, it is my considered view that the court established under the 2000 Act must apply and enforce compliance with procedures under the Act, that has created it.

The procedure followed by the Applicant in reporting this dispute to the Labour Commissioner is in conformity with the 2000 Act, though it did violate the repealed Act.

Tenuous, as it may seem, the court is bound to treat this Application as if it had been initiated under the 2000 Act, with the consequence that it. has now the jurisdiction to entertain it.

I find accordingly.

NDERI NDUMA

PRESIDENT - INDUSTRIAL COURT