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IN THE INDUSTRIAL COURT OF APPEAL OF SWAZILAND

Case 10/96 Thoko Shongwe

V

Allen Murray

Coram Sapire, J P Dunn,

Matsebula, J J A

For the Appellant: Mr. S. Motsa

For the Respondent: Mr. Nsibandze

Judgment

(11/06/1997)

The Appellant is a domestic worker. Her complaint is that the Respondent who was her employer, unfairly terminated her employment and dismissed her from his service on 22nd May 1996. She reported this "dispute" as she was entitled to do, to the Commissioner of Labour who, being unable to resolve the matter certified the dispute as unresolved.

The appellant then filed an "APPLICATION FOR DETERMINATION OF AN UNRESOLVED DISPUTE" with the Industrial Court, as the basis of her institution of proceedings in that court against the Respondent.. The form used for this purpose was that prescribed as " Form B " under the Rules of the Industrial Court. This, it was contended by the Respondent, and so argued both in the court a quo and before us, was inappropriate as the form relates to disputes under Section 57 (1) or 58(1) of the Industrial Relations Act No.l of 1966, (the Act). The Appellant, the argument is, is not one of the persons entitled in terms of those sections to report a dispute to the Commissioner: therefore there was no unresolved dispute to be referred to the court. This argument was upheld in the court a quo,

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and the Appellant's claim was dismissed. She has taken that decision on appeal to this court.

The first point taken by the Respondent is that as the applicant's representative, one Sipho Motsa is not an admitted practitioner he has no right to represent the Appellant either in signing her notice of appeal or in appearing before us. Here section 7 of the Act governs. The section provides that any party to any proceedings brought under the Act may be represented by a legal practitioner or any other person authorised by such party. The term "Court" in terms of section 2 of the Act includes both the Industrial Court and the Appeal Court established in terms of the Act Clearly there is no valid objection to Motsa representing the Respondent.

The remedies for unfair termination of services are prescribed in section 41 of the Employment Act

1980, (Act No. 5 of 1980).("the Employment Act)where it is provided that if an employee alleges that his services have been unfairly terminated, he can file a complaint with the Labour Commissioner for resolution. If the Commissioner is successful in achieving a settlement, the agreement is reduced to writing and the original retained by the Commissioner. If no settlement is achieved within twenty one days of the complaint being filed, the complaint is to be treated as an unresolved dispute and " the Labour Commissioner shall forthwith submit a full report thereon to the Industrial Court which shall then proceed to deal with the matter in accordance with the Industrial Relations Act"
The "Industrial Relations Act" there referred to is of course the prior Act which was superseded by the Act,. It is however the provisions of the present act which govern and which are to be applied..

Part VIII of the Act deals with "Disputes Procedure". The first section in this part of the Act is Section 57 which provides that" a dispute" may only be reported to the Commissioner of Labour by individuals who or bodies which are included in certain specified classes of person. The Appellant is not, it is common cause, one of a class so specified in the section who may report a dispute in terms thereof.

The Respondent, in supporting the judgment of the court a quo argued that the wording of section 57 (1) of the Act by implication repealed the provisions of the earlier Employment Act and deprived the Appellant of the remedies afforded her thereunder. In doing so Respondent's counsel made submissions beyond the issues which we are and the court a quo was, called upon to decide.

The point was however raised, and as the court a quo in giving its "ruling" stated specifically, but without being called upon to do so, that:

"Section 41 relates to an employee who files his complaint with the commissioner of Labour who upon failure to secure a settlement files a report with the Industrial Court For a start the Applicant is not an employee within the context of section 41. She is expressly excluded from the

definition of an employee."

This mistaken interpretation of the Employment Act even though obiter must be reconsidered, and corrected, thereby dispelling the impression created thereby that domestic employees have no protection against unfair dismissal. The applicant on a proper reading of the Employment Act is not excluded, expressly or otherwise, from the definition of an employee, which reads:

" 'Employee' means any person to whom wages are paid or payable under a contract of employment'

A domestic worker, such as the Appellant is, meets all the criteria of the definition, to be included in the term defined.

A court will not find that a statute or any provision thereof has been implicitly repealed by later legislation, unless the implication in inescapable. The intention of the legislature must be clear, and the intention to repeal must be the only possible interpretation. The approach of a court in to the inference of repeal of a statute or some of the provisions thereof is exemplified in

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The wording of section 5 of the Act, however confusing it may be in other respects, makes it clear that the Industrial Court is to have jurisdiction to hear, determine and grant relief in respect of claims arising inter alia in terms of the provisions not only of the act itself, but in terms of other legislation

including "an employment Act". Clearly the terms of the Act and the Employment Act are to be read, as complementing each other.

Section 41 of the Employment Act reads:

"41 (1) Where an employee alleges that his services have been unfairly terminated,.....the employee may file a complaint with the Labour Commissioner, Whereupon the Labour Commissioner, using the powers accorded him in Part II shall seek to settle the complaint.....,....."

The section makes no reference to " an undertaking". It is true as the President of the court a quo observed that in terms of section 2," an undertaking" is defined to exclude domestic work, this concept is totally irrelevant in determining who is eligible to lodge a claim under section 41 .There is no basis for

excluding the Appellant merely because her employment is that of a domestic worker.

I have already referred to the further provisions of this section which are brought into application if the Labour Commissioner is unable to resolve the dispute, and pointed out that in those circumstances the Labour Commissioner has to submit a full report to the Industrial Court which will then proceed to deal with the matter in accordance with the Industrial Relations Act.

Having failed to secure a settlement of the complaint, the Commissioner, issued a certificate under Section 65 (1) of the Act in which he certified that the complaint that had been "....reported to or intervened by me on the 3/06/96 under Section 57 (1) or 58 (1) is hereby certified as an unresolved dispute"

This certificate is misleading. The Appellant did not herself, as far as one can tell from the papers, specify that her complaint was made under any particular section of any particular act. The Labour Commissioner, who assumed that the complaint was made under the provisions of 57 (1) of the Act, is responsible for the seemingly incorrect statement of Appellant's claim The complaint in fact could only have come to him under the provisions of Section 41 of the Employment Act.. There is no indication in either statute of any special procedure for the referral of section 41 complaints to the Industrial Court. In the absence of any specific provisions to the contrary, such unresolved disputes can only be dealt with in accordance with Sections 57 and 58 of the Act. There is no other way of dealing with matters arising under Section 41 of the Employment Act provided for. Yet such matters are in terms of Section 41 (3)to be dealt with "in accordance with the Industrial Relations Act" The only real basis of the respondent's objection raised in the court a quo, is that the Appellant's papers do not correctly describe the statutory provisions under which the claim is made. The provisions of section 8 of the Act are here apposite and applicable.

Section 8 provides that the Industrial Court may disregard any technical irregularity which does not or is not likely to result in a miscarriage of justice. It seems to us that whatever deficiencies there may be in the Respondent's papers these are capable of amendment and should not have been allowed to determine the issues.

We accordingly order that the "ruling" of the court a quo be set aside, and the matter be remitted to the court a quo for hearing on the merits. The Respondent may amend her papers as she may be advised.

S.W. SAPIRE	B. DUNN J.	M. MATSEBULA
JUDGE PRESIDENT	JUDGE OF APPEAL	JUDGE OF APPEAL