THE INDUSTRIAL COURT OF APPEAL OF SWAZILAND

SWAZILAND STAFF ASSOCIATION FOR FINANCIAL INSTITUTIONS

Appellant

And

SWAZILAND DEVELOPMENT & SAVINGS BANK

Respondent

Case No. 12/2000

Coram:

ANNANDALE JP

MATSEBULA JA

MAPHALALA JA

For the Appellant:MR. P. DUNSEITH

For the Respondent:MR. M. SIBANDZE

APPEAL JUDGMENT

Maphalala JA

[1] The Appellant who was the Applicant in the court below moved an application in terms of Section 42 (6) of the Industrial Relations Act of 2000 before the Industrial Court for recognition as the exclusive collective employee representative for all non-unionisable staff employees in the employ of the Respondent.

[2] The Respondent raised certain points of law to the effect that the matter was improperly before the court and the court could not entertain it because; i) the matter falls under the definition of "dispute" in Section 2 of the Act; ii) the matter ought to have been reported and conciliated upon in terms of the statutory dispute procedures laid down by the Act; and iii) since the application had not been brought as one of urgency, the court could not entertain the dispute as it first had to be reported and conciliated upon before the application may be determined by the court.

[3] The court a quo upheld the points in limine and held that:

"1. We have found that the subject-matter of the application is a dispute in terms of the Act (Industrial Relations Act 1/1996). 2. In the absence of reasons to treat the matter as one of urgency the Applicant has no

alternative, but to comply with Part VIII of the Act and Rule 3 (2) of the Industrial

Court Rules.

The application is therefore dismissed. No order as to costs".

[4] Being dissatisfied with the above ruling the Appellant has appealed before this court against this finding on the following grounds:

"a) The learned Judge misdirected himself in law in holding that the Appellant was obliged to comply with the provisions of Part VIII of the Industrial Relations Act No. 1/1996.

a) The learned Judge erred and misdirected himself in holding that Section 43 (9) of the Act was to be read with Part VIII of the same whereas the said Section provided a specific and independent procedure for matters as the one in question".

[5] In arriving at this decision, the court a quo differed from and refused to follow the judgment of (he President of the Industrial Court in the case of Smawu vs Swaziland Wire Industries - Case No. 280/99.

[6] The brief history of the matter is that the application was instituted in May 2000 under the Industrial Relations Act of 1996, but by the time the matter was argued and judgment was delivered in the court below, the Industrial Relations Act of 2000 had been promulgated and had come into force. Nevertheless, nothing much turns on this change in applicable statutes since the relevant sections in the 1996 Act were effectively re-enacted in the 2000 Act.

[7] It was contended before us by Mr. Dunseith for the Appellant that the requirement that a dispute be reported before the Industrial Court may take cognisance of it arises from Rule 3 (2) of the Industrial

Court Rules 1984 of which is manifestly ambiguous and/or obsolete. The rules were promulgated in 1984 under the 1980 Act. They make reference to various parts and sections of the Act which were changed or no longer applied under the 1996 and 2000 Acts. Nevertheless, applying the rules creatively to analogous parts and sections of the 1996 and 2000 Acts, it is noteworthy that Rule 3 (1) draws a distinction between an application for recognition under Section 4 of the 2000 Act (Section 43 of the 1996 Act) and an application for determination of an unresolved dispute. Different forms are also prescribed. Section 42 (5) (6) and (7) of the Act prescribes the procedure to be followed where an organization with the required membership seeks recognition.

[8] In the instant case, so the argument goes, the Appellant applied in writing to the Respondent for recognition on the 23rd August 1999. The thirty days period prescribed by Section 42 (5) lapsed and the Respondent neither granted recognition, nor requested a verification count, nor lodged with the court its reasons for refusing to grant recognition. The Appellant therefore was then entitled and permitted by virtue of Section 42 (6) to apply to court for a recognition order. Section 42 does not require in the circumstances of the matter that a dispute be reported under Part VIII before the Appellant could apply to court. Indeed, such requirement is clearly inconsistent with the provisions of Section 42 (6) and (7).

[9] Mr. Dunseith further argued that the decision of the President of the Industrial Court in the case of Smawu vs Swaziland Wire Industries (supra) is correct and further that this judgment also reflects the practice of the Industrial Court during the last ten years. The learned Judge a quo's reliance on the Swaziland Fruit Canners case - Industrial Appeal Case No. 2/1987 was a misdirection, since that case did not involve an application for recognition and is clearly distinguishable.

[10] Mr. Dunseith contended that the appeal should be upheld with costs and the matter remitted to the Industrial Court for a hearing on the merits of the application.

[11] Mr. Sibandze who appeared for the Respondent advanced arguments au contraire. The thrust of Mr. Sibandze's argument is that the matter falls under the defination of "dispute" in Section 2 of the Act and therefore ought to have been reported and conciliated upon in terms of the statutory dispute procedures laid down by the Act. Further, since the application had not been brought as one of urgency, the court could not dispense with the requirement that the dispute first be reported and conciliated upon before the application may be determined by the court. Mr. Sibandze relied heavily on the dictum by Hannah CJ (as he then was) in the case of Swaziland Fruit Canners (Pty) Ltd vs Phillip Vilakati and Bernard Vilakati - Case No. 2 of 1987 where the learned Chief Justice stated the following:

"...The policy of the Industrial Relations Act is that before a dispute can be ventilated before the Industrial Court it must be reported to the Labour Commissioner who is obliged to conciliate with a view to achieving a settlement between the parties. Where the conciliation is successful machinery exist for the agreement arrived at to be made an order or award of court, but where the dispute remains unresolved the labour Commissioner is obliged to issue a certificate to that effect and then, and only Ihen, may application be made to the Industrial Court for relief".

[12] The learned Judge in the court a quo relied on the above dictum and rejected what was said by the President of the Industrial Court in the Swaziland Manufacturing and Allied Workers Union vs Swaziland Wire Industries, Industrial Case No. 280/99 where the learned President stated the

following:

"It is our considered view that in lodging a Section 43 (6) application the Applicant need not comply with the procedure provided for under Part VIII of the Act. If this was the intention of the legislature, it would have stated so in clear and unequivocal language".

[13] The above shows clearly that there is a conflict of decisions in the Industrial Court on the application of Rule 43 (6) of the Act. It appears to me though that the learned Judge in the court a quo erred and misdirected himself by basing his decision on the case of Swaziland Fruit Canners (supra) where the Appellant could not have availed itself the procedure provided by Section 43 (6) of the Act, but was obliged to proceed by way of Part VIII of the Act. It appears to me also with the greatest respect to the learned Judge a quo that he did not appreciate the distinction between an individual dispute and collective dispute. Clearly, the quotation referred to by the learned Judge in the court a quo by Hannah CJ (as he then was) is obiter dictum and does not constitute the ratio decidendi of the case relied upon by the learned Judge.

[14] On reading the relevant statutes it appears to us that the Act provides a specific and distinct procedure to be followed in resolving matters as the one in question viz recognition as collective employee representative. In lodging an application under Section 43 (6) of the Act, the Applicant need not comply with the procedure provided for under Part VIII of the Act. In this regard we adopt and embrace what was said by the learned Judge President in Swaziland Manufacturing and Allied Workers Union vs Swazi Wire Industries (Pty) Ltd (supra).

[15] We hold that if the legislature had intended that an applicant who brings an application before the Industrial Court by invoking Section 43 (6) of the Act to be obliged to comply strictly with the procedure provided for under Part VIII of the Act, it would have stated so expressly. It appears to us that Section 43 (6) provides an alternative remedy to a union or staff association which has been refused recognition by the employer. In this regard the submission made by Mr. Dunseith for the Appellant carried considerable force that when applying the rules creatively to analogus parts and sections of the 1996 and 200 Acts, it is noteworthy that Rule 3 (1) draws a distinction between an application for recognition under Rule 42 of the 2000 Act (Section 43 of the 1996 Act) and an application for determination of an unresolved dispute. Different forms are also prescribed.

[16] Section 42 (5), (6) and (7) of the Act prescribes the procedure to be followed where an organization with the required membership seeks recognition. In the present case it is common cause that the Appellant applied in writing to the Respondent for recognition on 23rd August 1999. The thirty days period prescribed by Section 42 (5) lapsed and the Respondent neither granted recognition, nor requested a verification count, nor lodged with the court its reasons for refusing to grant recognition. Clearly, the Appellant was then entitled and permitted by virtue of Section 42 (6) to apply to Court for a recognition order. Section 42 does not require in the circumstances of this matter that a dispute be reported under Part VIII before the Appellant could apply to court. Indeed, such requirement is clearly inconsistent with the provisions of Section 42 (6) and (7).

[17] Finally, it is a matter of concern that reliance has been placed on Rule 3 of the Industrial Court Rules of 1984 which requires that a dispute be reported before the Industrial Court may take cognisance of it when the said Rules were promulgated in 1984 under the 1980 Act. These Rules make

references to various Parts and Sections of the Act which were changed or no longer applied under the 1996 and 2000 Acts and may clearly be manifestly ambiguous and/or obsolete. It appears to me that there is an urgent need to update the Rules of Court to conform to the current Act.

[18] In the result, I propose that the appeal should be upheld and the matter remitted to the Industrial Court for hearing on the merits of the application; and it is so ordered.

[19] We make no order as to costs.

MAPHALALA JA

I AGREE

ANNANDALE JP

I AGREE

MATSEBULA JA

Delivered on the..... Day of.....2005