IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE CASE NO. 52/96

In the matter between:

SIPHO DLAMINI	APPLICATION
AND	
THE ROYAL SWAZILAND	
SUGAR CORPORATION	RESPONDENT

CORAM

C. PARKER :	JUDGE
R.C.M. BHEMBE :	MEMBER
D.P.M. MANGO :	MEMBER
For the applicant :	Mr. E. Hlopbe
For the respondent :	Mr. M. Sibandze

RULING

The respondent has raised a preliminary objection thus –

On the date upon which the dispute before the Honourable Court first arose, on 3 August 1995, there was a Union active and recognised in the Respondents undertaking, being the Swaziland Agricultural and Plantations Workers Union (S.A.P.W.U.).

The dispute before Court was reported by the Applicant, and not the said S.A.P.W.U. and in the premises such report of dispute was not in accordance with Section 50 (1) of the Industrial Relations Act No. 4 of 1980 (now Section 57 (1) of Act 1 of 1996).

In the premises the provisions of Part VIII of the Industrial Relations Act 1996 were not followed and accordingly this matter is not properly before the Honourable Court which has no jurisdiction to take cognizance of it.

Mr. Sibandze, counsel for the respondent argued the point on behalf of the respondent.

His point was briefly this : It is common cause between the parties that the Swaziland Agricultural and Plantation Workers Union (SAPWU) was a union recognized and active in the respondents's undertaking at the time the dispute forming the basis of this matter arose.

Accordingly, the applicant was not entitled to report the dispute personally in terms of section 57 (1) (f) of the Industrial Relations Act, 1996 (Act No. 1 of 1996) (the 1996 Act). Having done that he failed to adhere to Part VII of the repealed Industrial Relations Act, 1980 (Act No. 4 of 1980) (the 1980 Act)

which is now Part VIII of the 1996 Act.

He submitted therefore that this Court cannot take cognizance of the applicant's application in terms of Rule 3 (2) of the Industrial Court Rules, 1984 (Industrial Court Rules).

In support of his contention, Mr. Sibandze referred the Court to its own decision in Eric Khumalo v Usuthu Pulp Company Limited. Industrial Court Case No. 70/96.
Mr. Hlophe, counsel for the applicant, agreed with Mr. Sibandze that the applicant reported the dispute himself, and also that the SAPWU was the industry union recognized and active in the respondent's undertaking at the time applicant was dismissed.

But he contended that section 57 (1) of the 1996 Act does not say that it contains the only procedure available to an employee who wishes to report a dispute to the Commissioner of Labour. In this connection he referred the Court to section 41 (1) of the Employment Act, 1980 (Act No. 5 of 1980) (the Employment Act). He submitted that an employee whose services have been terminated may report a dispute to the Commissioner of Labour under section 41(1) of the Employment Act. In that event, he continued, section 41 (3) of the Employment Act would come into play.

On this point, Mr Hlophe relied on authority in Paul Sibusiso Mkhatshwa v Langa Bricks (Pty) Ltd and Labour Commissioner. Industrial Court Case No. 79/96, and John Mdluli and Big Bend Sugar Estate, Industrial Court Case No. 29/97.

With respect, Mkhatshwa is not apposite here because, as Mr Sibandze rightly pointed out, the point was raised but it was not determined.

In John Mdluli (at p.6) the Court there held that an applicant who does not wish to use the dispute reporting procedure under section 57 of the 1996 Act may report a dispute to the Commissioner of Labour under section 41 of the Employment Act without being represented by an industry union recognised and active in the respondent's undertaking.

As I said in Eric Khumalo,. this Court accepts this principle which was enunciated in John Mdluli.

Indeed, I applied the principle in Zeth Mfanuzile Dlamini v Swaziland Liquor Distributors and Commissioner of Labour, Industrial Court Case No 19/97(at p.4) –

"...a unionized employee who does not want to be represented by an industry union and who wishes to avoid the stipulations in paragraphs (b) and (f) of section 57 of the Industrial Relations Act (1996) is entitled to avail himself or herself of the reporting procedure provided by section 41 of the Employment Act."

So in the present matter the applicant could only have reported the dispute either under the 1996 Act or under the Employment Act. "The applicant, with the greatest respect, cannot and should not be allowed to eat his proverbial cake and have it." (Eric Khumalo. at p. 6)

If the applicant reported the dispute under the 1996 Industrial Relations Act, this Court cannot take cognizance of the application since the reporting would have not been made in accordance with Part VIII thereof (i.e. Part VII of the 1980 Act) because the report would have been made in breach of section 57 (1) (f) of the 1996 Act, (i.e. section 50 (1) (f) of the 1980 Act). The said section 57 provides

"(1) A dispute may only be reported to the Commissioner of Labour by -

a) an employer;
b) an organisation which has been recognised in accordance with section 43; © a member of a Works Council;
c) a member of a Joint Industrial Council;
d) any other organisation active in the undertaking concerned in the dispute where no organisation has been recognised in terms of section 43;
e) any employee in the undertaking where no organisation is active in the undertaking concerned in the dispute."

Bui then Mr. Hlophe contended that a report under the 1996 Act may also be made under section 58 thereof. With respect, such a contention is a fallacy. Section 58 merely provides for the form and content of a report made by a person under section 57 and the service of such a dispute so reported.

The "person" in section 58 refers to the natural and legal persons mentioned in section 57 that are entitled to make a report.

In sum, sections 57 and 58 are complementary not alternative. Section 58 provides –

(1) A report of a dispute shall be made in writing, signed by the person making the report and shall specify -

a) the parties to the dispute;
b) the address of each of the parties;

c) particulars of all the issues in dispute stating as precisely as possible their nature and scope; and
d) what steps, if any, have been taken for the settlement of the dispute either in accordance with the provisions of a Joint Industrial Council constitution, a collective agreement registered under Part VII, a Works Council constitution or otherwise.

(2) A party reporting a dispute shall immediately deliver by hand or send by registered post a copy of the report to the other party or parties to the dispute."

Mr. Hlophe argued further that when an employee is still in the employ of an employer and perhaps a strike or a retrenchment is looming or the issue of overtime arises and the employee is still employed then in terms of section 57 (1) of the 1996 Act, it is an industry union that is entitled to report the dispute. But where the employee is no longer in the employ of the employer thon he ceases to be a member of an industry union. In such a situation the employee is entitled to report a dispute himself or herself without union representation in terms of section 41 of the Employment Act.

In the experience of this Court many industry unions have continued to assist their members who allege unfair termination of their services in negotiating terminal benefits and in reporting disputes arising from such unfair termination of services to the Commissioner of Labour.

In any case, Mr. Hlophe did not cite any authority in support of his contention that an industry union can only represent an aggrieved employee who is still employed. With the greatest respect, I cannot see the legal basis for Mr. Hlophe's contention.

Mr. Hlophe's main submission, as I understand it, is however, that the applicant could make a report under the Employment Act. As I have already said, the applicant was entitled to do that. If he proceeded under the Employment Act, then section 41 thereof comes into play, and then the question

that arises is this : Was the procedure laid down in section 41 followed?

Section 41 of the Employment Act provides –

"(1) Where an employee alleges that his services have been unfairly terminated, or that the conduct of his employer towards him has been such that he can no longer be expected to continue in his employment, the employee may file a complaint with the Labour Commissioner, whereupon the Labour Commissioner, using the powers accorded to him in Part II shall seek to settle the complaint by such means as may appear to be suitable to the circumstances of the case.

5

(2) Where the Labour Commissioner succeeds in achieving a settlement of the complaint, the terms of the settlement shall be recorded in writing, signed by the employer and by the employee and witnessed by the Labour Commissioner: one copy of the settlement shall be given to the employer, one copy shall be given to the employee and the original shall be retained by the Labour Commissioner.

(3) If the Labour Commissioner is unable to achieve a settlement of the complaint within twenty-one days of it being filed with him, the complaint shall be treated as an unresolved dispute and the Labour Commissioner shall forthwith submit a full report thereon to the Industrial Court which will then proceed to deal with the matter in accordance with the Industrial Relations Act."

As I said in Zeth Mfanuzile Dlamini. at p. 7.

"The Employment Act contains provisions relating to its own procedure, starting from the filing of a complaint with the Commissioner of Labour to the point where the Commissioner submits a full report to the Industrial Court. What is lacking in the Employment Act is the aspect of court practice and procedure. For this the Employment Act should look up to or link up with the Industrial Relations Act, so to speak, so long as a dispute remains unresolved and a full report is submitted thereon by the Commissioner of Labour to the Court for the Court's determination."

In hoc casu as one can gather from the papers filed of record, "no report, let alone a 'full' one, has been submitted by the Commissioner of Labour to this Court, if it is the applicant's case that his was the filing of a complaint with the Commissioner of Labour under the Employment Act and not the reporting of a dispute under the Industrial Relations Act." (Zeth Mfanuzile Dlamini. at p. 7)

Further on in Zeth Mfanuzile Dlamini. loc. cit, I had this to say -

"I have respectfully adopted and applied the ... principle enunciated by Hannah, CJ in Swaziland Fruit Canners (at p. 2) and also the principle enunciated by Classen, AJ in Ubombo Ranches v Pan Attendants (at p. 10) to arrive at the following conclusion: In my view it is a peremptory requirement of the Employment Act Section 43 (3)) that before the Court proceeds to deal with a matter, there must be before it a "full report" on the unresolved dispute (forming the basis of the matter) which has been submitted to it by the Commissioner of Labour.

I put it thus in Eric Khumalo. at p. 14 -

'In my view it is only when, under the Employment Act, the Commissioner of Labour has submitted a full report to it that the Court may 'proceed to deal with the matter in accordance with the Industrial Relations Act.' If there is no full report submitted by the Labour Commissioner, as I have decided there is none in the present case, the Court cannot proceed to deal with any matter in accordance with the Industrial Relations Act, because logically there is no matter to deal with.' "

Then on the question as to whether the certificate of unresolved dispute issued by Commissioner of Labour can be treated as a full report within the meaning of section 41 (3) of the Employment Act, I had this to say in Eric Khumalo, at pp. 7-8 -

"One must not lose sight of the fact that in its wisdom the legislature under the Employment Act expected the Labour Commissioner to submit 'a full report' on a complaint to the Court after he has failed to 'achieve a settlement of the complaint' and has therefore treated the original complaint as an unresolved dispute.

The Labour Commissioner has not submitted ('presented for consideration or decision' -Concise Oxford Dictionary 8th ed) 'a full report' to the Court for the Court's consideration or decision.

The certificate issued under the Industrial Relations Act cannot by any stretch of imagination be taken by this Court to be or even approximate 'a full report* within the meaning of section 41 (3) of the Employment Act, A fortiori, it was not submitted to this Court by the Commissioner of Labour.

A full report must in my view be a report whose contents should generally be sufficient for the Court to rely on in order to consider and make a decision, without probably the aid of affidavits and other suchlike evidentiary papers that are filed of record in applications before the Court."

Even though the question as to whether a breach of the procedure under section 41 (3)of the Employment Act is a mere technicality which can be cured by an amendment of the applicant's papers or which can be ignored by the Court in terms of section 8 (1) of the 1996 Act did not arise in submissions, it behoves me, ex abundanti cautela. to deal with it.

In this regard I stated in Eric Khumalo. at p. 9, thus -

"... I wish to reiterate the point that the procedure laid down in section 41 (3) of the Employment Act is not a mere technicality whose breach can be cured by an amendment of the applicant's papers by invoking section 8 (1) of the Industrial Relations Act.

In any case I don't see how an amendment of the applicant's papers to the effect that his was the filing of a complaint with the Commissioner of Labour under the Employment Act and not the reporting of a dispute under the Industrial Relations Act can assist the applicant. Such an amendment would be an exercise in monumental futility because, as I have said, he could not by himself, without union representation, report a dispute to the Commissioner of Labour. And if he did file a complaint under the Employment Act, the Labour Commissioner has not submitted a full report thereon to the Court."

In the final analysis, there is no reason to motivate me not to follow the precedents referred to above.

That being the case, the result must be the same in this matter as it was in Eric Khumalo. and Zeth Mfanuzile Dlamini.

From the foregoing, I have come to the conclusion that the respondent's preliminary objection must be upheld as it is wellfounded. The respondent's prayer should therefore be granted.

Accordingly, the order of this Court is that the applicant's application is dismissed. This Court makes no order as regards costs.

DR. COLLINS PARKER

JUDGE OF THE INDUSTRIAL COURT

17 November 1997.