IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE CASE NO.220/99

In the matter between:

MFANASIBILI NKAMBULE APPLICANT

and

KHARAFA (PTY) LIMITED

t/a KHARAFA TRADING RESPONDENT

CORAM

NDERI NDUMA: PRESIDENT

JOSIAH YENDE: MEMBER

NICHOLAS MANANA: MEMBER

FOR APPLICANT: MR. E. HLOPHE

FOR RESPONDENT: MR. M. SIBANDZE

RULING

10/5/2000

The Applicant has brought this application on notice of motion claiming Emalangeni four thousand (4,000) being remuneration he would have received for the period of ten (10) months he was in custody allegedly at the instance of the Respondent.

The application is brought in terms of Section 39 (5) of the Employment Act which reads thus;

"39 (5) where an employee is remanded in custody as a result of a complaint laid by his employer in relation to his employment naming him as an accused is subsequently acquitted of that charge or any other related charges the employer shall pay to the employee an amount equal to the remuneration he would have been paid during the suspension".

In its answering Affidavit the Respondent has raised the following points in limine:-"3.1 That the Applicant has not complied with the rules of the above

Honourable court and has brought this matter on Notice of Motion and not in the form as prescribed by rules of the Industrial court Rules. The Applicant has not brought this matter on an urgent basis and he has failed to allege urgency or any reason why this Honourable court should dispense with the normal time limits, forms and service provided for in the Rules of court.

3.2 That this matter is prematurely before this Honourable court and that the Applicant has overlooked all the processes as laid down by the Industrial relations Act of 1996 and has not reported a dispute neither has a certificate of unresolved dispute in the matter been issued by the Labour Commissioner. I submit that this Honourable court cam-tot entertain this matter which is improperly before it".

The questions that we have been called upon to determine can be summed up as follows:

I) Whether or not the present matter is a dispute within the meaning of the Industrial Relations Act No. 1 of 1996.

ii) If so, whether or not the Applicant is obliged to follow the provisions of Part VIII of the Industrial Relations Act.

iii) If it is not a dispute in terms of the Act, whether or not the Application ought to have been brought on a certificate of urgency.

Rule 3(2) of the Industrial Court rules states that the court may not take cognisance of any dispute which has not been reported or dealt with in accordance with Part VII (read Part VIII) of the Act.

On the basis of this rule, the court has on numerous occasions declined to entertain disputes brought before it in breach of the provision of Part VIII of the Act, unless the said disputes are categorised as urgent matters by the court on application.

The Applicant has submitted that the present application need not be preceded by the procedures of Part VIII for the simple reason that there is no actual dispute which require, conciliation.

The Applicant alleges that he merely seeks enforcement of his legal rights in terms of Section 39 (5) of the Employment Act, 1980 as amended by way of an injunction and therefore this cannot be categorised as a dispute within the meaning of the

Industrial Relations Act since the right to the Applicant accrues as a matter of law and no facts are in issue.

Section 2 of the Industrial Relations Act No. 1 of 1996 defines a dispute to include (e) application or the interpretation of any law relating to employment".

To enforce the provisions of Section 39 (5) of 1980 as amended, the court has to determine the application of the provision to the circumstances of the Applicant and secondly, the court has to interpret the section so as to enforce it as prayed for in the application. To accomplish this task we have to entertain competing arguments by the parties to arrive at a reasoned decision thereto.

It follows in our view that the subject matter of the application is a dispute within the meaning of the Industrial Relations Act.

Certain disputes however are exempt from the procedure as provided under Part VIII of the Act on the basis that the same are urgent.

For this exemption to be applied in terms of Rule 9 (1)(e) of the rules of the Industrial court, good cause must be shown for the court to condone any failure of strict compliance with the rules of the court and in particular for failure to comply with rule 3 thereof.

In the Industrial court of Swaziland Case No. 2/98 between Sean Maker and Stand Band Swaziland Ltd. the Applicant thereof brought an application in terms of Section 39 (5) of the Employment Act No. 5 of 1980 as amended on a certificate of urgency. On the particular facts of that case Justice Parker (as he then was) found that

"the applicant's explanation as to why the application, was launched on 16 January 1998 is satisfactory and also that this does not take away the urgency of the matter. In the result it is our decision that the

applicant's prayer that the application be heard as an urgent matter be granted".

This case can be distinguished from the present one on the basis that the same has not been brought on a certificate of urgency. No facts have been presented on the papers as filed of record seeking to show good cause why the court should condone failure of strict compliance with the rules of the court.

We have already found that the subject matter of the Application is a dispute within the meaning of the Industrial Relations Act.

In the absence of any compelling reasons to treat the matter on the basis of urgency, the Applicant is obliged to strictly comply with the provisions of Part VIII of the Act and the Rules of this court.

The consequence of our finding s that the Application is dismissed with no order as to costs.

NDERI NDUMA

JUDGE PRESIDENT - INDUSTRIAL COURT