IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 179/98

In the matter between:

SWAZILAND MANUFACTURING

AND ALLIED WORKERS UNION APPLICANT

AND

SWAZILAND BOTTLING COMPANY RESPONDENT

CORAM

NDERI NDUMA : PRESIDENT

JOSIAH YENDE : MEMBER

NICHOLAS MANANA : MEMBER

For the Applicant : Mr Alex Shabangu

for the Respondent : Mr Musa Sibandze

RULING

The applicant has brought an application for orders:

1. Dispensing with time limits, and all the requirements relating to forms and notices and treating the matter urgent.
2. That a rule nisi do hereby issue calling upon the respondent to show cause on Wednesday 16th September, 1998 why an order should not be made.

2.1 declaring items 1, 2, 3, 4, 5 and 6 of the respondents strike rules illegal and invalid and prohibiting the respondent from implementing same.
2.2 declaring the respondents conduct as amounting to an unlawful lockout.

2.3 directing the respondent is liable to pay wages to the applicants wages for the period commencing 26th August, 1998 the last day of the lockout\strike.

3. Further and or alternative relief.

4. That rule issued under paragraph 2 herein operate as an interim order pending the finalisation of this application.

The application is founded on the affidavit of Patrick Jabulani Jonga President of SMAWU herein after referred to as the Applicant for convenience. An answering affidavit sworn by Marltinus. Loiter Pullinger has be filed by the Respondent wherein four points in limine are raised. These points in limine are as follows:.

(a) That this application ought not to be brought while the applicants persist in their strike as this is contrary to S 72 (1) of the Industrial Relations Act No. 1 of 1996 (which we shall continue to refer to as the Act for Convenience)

(b) Applicant has no locus standi as it lacks sufficient interest in the matter and in the remedy sought.
(c) That Applicant has not justified urgency and
(d) That Applicant has failed to establish the legal requirements for the granting of the interim relief sought.

The court has heard both counsel on the issues raised in Limine and having read the papers before it makes the following ruling.
It is common cause that the Applicant and its members are engaged in a strike as defined in Section 2 of the Act to mean "a complete or partial stoppage of work or slow down of work." It is not in dispute either that the said strike persists to date, what is in dispute is whether the same has caused a partial or a complete stoppage of work and the conduct of the Respondent upon commencement of the strike action.

The cause of the said strike is stated in the Founding Affidavit of the Applicant and is well illustrated in the document marked Annexture "D" to this Affidavit -headed- " A final report of the Mediators in the dispute between Swaziland Bottling Company and SMAWU."

On submissions of both counsel, the legality of the strike and its cause is not in dispute.

The prayers sought by the Applicants are clearly directed against the conduct of the Respondent in response to the strike. The dispute before court therefore is not that which was the subject of mediation prior to the commencement of the strike to this extent S 72(1) of the Act does not apply as has been submitting by counsel for the Respondent. An ordinary interpretation of this section supports our finding that a party who is engaged in a lawful strike is not barred from approaching this court when its rights as contained in the Act have been breached or are in danger of being breached while it is engaged in such lawful action. Indeed S 5(3) of the Act empowers this court to provide relief sought by the Applicants. This objection in limine is dismissed.

On the issue of Locus standi, this court has been referred to the case of SWAZILAND MANUFACTURING AND ALLIED WORKERS UNION and 99 others VERSUS NATEX (SWD) (PTY) LTD Case No. 76/97. Counsel for the Respondents argued that the applicant has no sufficient interest in the matter and in the remedy sought. Further, he submitted that no rights of the Union have been violated nor is the Union in danger of any monetary loss and therefore the Applicants ought to be the actual individual employees.

Whereas this argument seems to find support in the authority cited, this matter is distinguishable from that case firstly because the 1st Applicant therein was not recognised by the respondent as the sole bargaining unit representing all employees in the respondent's undertaking as is the case here and secondly the subject matter in that case was reinstatement of individual employees who had been declared redundant as opposed to this case wherein the applicant seeks orders against actions taken by the respondents in direct response to a strike action called by the applicant. It is our considered view that the Applicant has sufficient interest in the strike action and the remedy sought in this application. We cannot therefore uphold the objections in limine as concerns Locus standi.

Our findings have support in the Dictum of justice C. Parker in the case of.

Swaziland Agriculture and Plantation Workers Union Versus United Plantations (SWD) Ltd. Case No. 79/98 P 5-6.

4 Wherein the Judge stated:

"The applicant does not pray for an interim relief ordering the respondent to abide by the terms of the Recognition Agreement and Disciplinary Code. If the application was for such an interim order, then surely the applicant would have Locus standi since the applicant and the respondent are the parties to the agreement".

We have read the founding Affidavit of the applicant and the answering affidavit of the respondent and are satisfied that the Applicant has substantial interest in the ongoing strike and the remedy sought being the representative of the employees in terms of the Recognition Agreement.

This point in Limine cannot be upheld therefore.

The power of the Court to hear urgent application is contained in Rule 9 (1) of the Industrial Court Rules (ICR). The rule provides

Quote

We agree with Mr. Sibandze that the court is to exercise this discretion judiciously and on good grounds. The applicants embarked on a strike action on 26/8/98. The strike rules contained in Annexture C were issued immediately safe for rule no. 2 which has been withdrawn. This is more than 12 days before this application was brought. We have considered submissions made by both counsel in this regard and the contents of para. 17 of the founding affidavit on which the need for urgency is based. We have also considered the authorities referred to in the Industrial Court Case of Swaziland Agriculture and Plantation Workers Union and United Plantations (SWD) Ltd. Case No. 79/98 i.e. Nasionale Bierbrouery (Edms) BPK v John None Audere 1991 (1) SA 85 (TPD) In the head notes the court there held,

"As to the question of whether the requirement of urgency had been fulfilled, that the loss of income and medical aid benefits was inherent in any dismissal, whether fair or not, and that there was authority for the point of view that urgency could not be. founded upon the financial needs of employees".

And

In the case of Food and Allied Workers Union V National Co-operative Dairies, Ltd (2) (1989) 9 ILJ 1033 (IC): Quoted in Nationale Bierbrouery at p.89:

"In food & Allied Workers Union v National Co-operative Dairies, the

applicant workers had been dismissed for going on strike. They applied for interim relief and based the urgency of the application inter alia on the fact that they would lose income and would have to vacate accommodation supplied by the company. The court found that the loss of income is a normal consequence of every dismissal and could therefore not be regarded as an exceptional circumstances to warrant interim relief.

The Applicants assertion that their wages and other benefits are now threatened by the strike rules does not change this position as such hardships whether lawful or unlawful are incidental and reasonably foreseeable in a strike situation. We are fortified in this rinding by the serious dispute of fact as to whether the Respondent has embarked on a lock-out or not which issue can best be determined when the merits of the application have been heard. This point in Limine is upheld.

Counsel for the Respondent submitted in support of the fourth objection in Limine that the Respondent has failed to establish the Four established Legal requirements for the granting of an interim interdict. The requirements were referred to with approval in Swaziland Dairies (Pty) Ltd v Meyer 1970 - 1976 S L R 91 at 92 where pike CJ stated.

'To entitle the applicant to the exercise by the court of its discretion to grant an interim interdict it is clear from the authorities that he must show (a) that the right which is subject matter of the main action and which he seeks to protect by means of interim relief is clear or, if not clear, is prima facie established, though open to some doubt; (b) that, if the right is only prima facie established, there is a well-grounded apprehension of irreparable harm to the applicant if the interim relief is not granted and he ultimately succeeds in establishing his right; © that the balance of convenience favours the granting of interim relief; and (d) that the applicant has no other satisfactory remedy. See LF Boshoff Investments (Pry) Ltd v Cape Town Municipality 1969 (2) SA 256 C at p 267"

The test was also applied by this Court in the case of Swaziland Agriculture and Plantations Workers Union and United Plantations (SWD) Ltd. Case No. 79/98.

Mr. Sibandze submitted that the Applicant has not established a prima facie right to wages while its members are engaged in a strike regardless of whether the strike is lawful or not. He referred the Court to Section 68 (2) of the Industrial Relations Act No. 1 of 1996 which states:

"Nothing in subsection (1) shall be construed as imposing on an employer

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any obligation to pay for any services of an employee which are withheld as a result of strike action or denied as a result of a Lock out action taken in conformity with this part".

Mr. Shabangu for the Applicant argued that he had established a prima facie right to wages on the papers as the employees were only involved in a go-slow strike and not a complete withdrawal of services. He submitted further that employees are as of right entitled to their wages by fact of their status as employees whether they are working or not.

He found support for this argument from the title of the Employment Act No. 5 of 1980 which reads "An Act to consolidate the Law in relation to employment and to introduce new provisions designed to improve the status of employees in Swaziland". He further referred this court to S 47 (1) of the same Act and emphasized that the section deems wages to fall due and is not dependent on whether the employees are working or not.

With the greatest of respect to counsel we cannot accede to this argument. If this were to be the case, no one would choose to work if they were entitled to wages by fact of their status.

It is common cause that the Applicant's members are involved in a strike action. S 68 (2) does not oblige the Respondent to pay wages regardless of whether the strike is partial or total and to this extent, the Applicant has failed to establish a prima facie right to wages while its members persist in the said strike. This issue will be best addressed when the matter is heard on merits as there is a serious dispute of fact as to whether the strike action is partial or complete. In the Plantations case cited supra. On page 5 Justice C. Parker stated:

"We agree with Mr. Smith that it is not open to this court to rely on the papers and grant the interim relief sought when there is a Plethora of dispute of facts between the applicant and the respondent".

No irreparable harm will be suffered even if the Applicants ultimately succeeds as is almost always the case in disputes involving monetary loss as the same are recoverable in all courts of law in the country. The Balance of Convenience too favours the respondent in our considered view.

As regards the prayer to declare the respondents conduct as amounting to an unlawful lockout we have considered the submissions of both counsel especially

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Mr. Shabangu's submission that the strike rules referred to in this application amount to a Lock out and a violation of S 79 (1) (b) & (e)of the Act.

Whether or not the Respondent has embarked on a Lock-out is a matter of both Law and fact and the Respondent disputes this allegation strongly. It is in the interest of justice that this matter be determined after hearing both sides on merits. We are confident that no irreparable harm would befall the applicants as the objective of both parties is to finally resolve this dispute for the benefit of the employees, the Industry and the Nation. This objection in limine is also upheld.

In the final analysis we make the following order: It is ordered that:

(1) This application shall proceed to trial on the Merits

(2) No interim order is made
(3) There shall be no order as to costs.

NDERI NDUMA PRESIDENT OF THE INDUSTRIAL COURT.