IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 62/05

In the matter between:

SWAZILAND NATIONAL ASSOCIATION

OF CIVIL SERVANTS APPLICANT

and

SWAZILAND GOVERNMENT RESPONDENT

CORAM;

NDERI NDUMA:PRESIDENT

JOSIAH YENDE: MEMBER

NICHOLAS MANANA:MEMBER

FOR APPLICANT P. R. DUNSEITH

FOR RESPONDENTADV. L. MAZIYA

J U D G E M E N T - 28/02/05

The Applicant is the Swaziland National Association of Civil Servants (SNACS) an industry union duly constituted and registered in accordance with the provisions of the Industrial Relations Act, 1996.

The Respondent is the Swaziland Government, duly represented herein by the Attorney General in terms of the provisions of the Government Liabilities Act No. 2 of 1967.

The Applicant was duly recognized by the Respondent as the exclusive collective representative and bargaining agent for all unionisable civil servants as stipulated in the Recognition Agreement of 18th March 1992.

The application was filed under a certificate of urgency on the 14th February 2005 by way of Notice of Application seeking for an order in the following terms:

a) Waiving the usual requirements of the rules of court regarding reporting and conciliation of disputes and notice and service of applications in view of the urgency.

b) Setting aside the retrenchment letters and exercise purporting to terminate the services of so-called daily paid employees as at the 31st march 2005.

c) Interdicting and restraining the Respondent from retrenching daily paid (temporary employees) who were in the employ of the Swaziland Government on 1st October 1995 and who will, from their date of

appointment, have completed 10 (ten) years continuous service by the time they reach the normal retirement age of 60 years, without First confirming such employees in the permanent and pensionable establishment.

d) Ordering the Respondent to engage with the Applicant in bona fide negotiations with regard to the principles governing the redundancy and retrenchment of daily paid employees.

e) Costs.

f) Further and/or alternative relief.

The application is grounded on the Founding Affidavit of one Quinton Dlamini, the Secretary General of the Applicant who stated that he was duly authorized to bring the application by virtue of a resolution of the Applicant annexed to the application and marked W.

No Supporting and/or Confirmatory Affidavits were filed to augment the Application. A plethora of supporting documentation marked A to M was however filed.

The Respondent was in terms of the Notice of Application required to attend court with its opposing affidavit (if any) on the 21st February 2005.

The Respondent duly filed its Answering Affidavit on the said date. The same was deposed to by one Cyril J. M. Kunene, the Principal Secretary for the Ministry of Public Service and Information of the Respondent.

Therein, in addition to the response on the merits, was raised points in limine that may be summarized as follows:

1. The Applicants do not give any good reasons why the court should dispense with the ordinary procedure and Rules of Court and hear the matter as one of urgency.

2. The Applicants do not say why they cannot be afforded substantial redress at a hearing in due course.

3. With regard to the relief sought in prayers (b) and (d) of the Notice of Application, the Applicant has not given reasons why their matter will not be properly dealt with by the Conciliation Mediation and Arbitration Commission (CMAC).

4. With regard to prayer © no basis has been laid out for the relief sought in that the Applicants have not established and satisfied the requirements for the final interdict sought.

The Applicant has since filed a further Affidavit in reply to the Respondent's Answering Affidavit.

The matter came for arguments on the afternoon of the 25th February 2005 and the morning of the 26th February 2005.

Mr. Peter Dunseith appeared for the Applicant whereas Advocate Lucas Maziya duly instructed by the Attorney General appeared for the Respondent.

The court directed that the matter be argued simultaneously in respect of the points in limine raised by the Respondent and the merits of the application.

Mr. Dunseith for the Applicant therefore commenced arguments followed by Mr. Maziya.

The nub of the arguments for the Applicants were summarized in the Applicant's Heads of Arguments and may be crystallized as follows:

1. The matter is urgent and deserves to be dealt with as such because approximately three hundred (300) members of the Applicant, who are employees of the Respondent have been declared redundant by the Principal Secretary Public Works & Transport by a Notice to the Labour Commissioner dated the 19th November 2004, and they fell in terms thereof to be retrenched on the 31st March 2005.

2. That if the Applicant followed the procedure provided under Part 8 of the Industrial Relations Act No, 1 of 2000 and reported a dispute to the Labour Commissioner and for CMAC to conciliate the same, the employees would be retrenched before the process came to fruition and they would not be able to get adequate substantial redress in due course. That the Applicant had given the Respondent sufficient time within which to respond to the Application and did not put the Respondent in any undue pressure in respect thereof.

That the exercise due to be conducted by the Respondent is unlawful because:

(a) The notice itself is, insufficient, defective and therefore invalid;

(b) The reasons for declaring the employees redundant contained in the notice did not conform to Section 2 and 36 of the Employment Act and

(c) In terms of the authority in the case of Vusumuzi Shongwe and the Principal Secretary Ministry of Works and Transport and Others, Industrial Court of Swaziland Case No. 62/2004. the Applicants were employees protected by part 5 of the Employment Act No. 5 of 1980, and their services could only be terminated in terms of Section 36 as read with Section 42 (2) (a) and (b) of the Act.

That the redundancies were declared in breach of the Recognition Agreement and in particular Clause 7 that required principles of the redundancy exercise to be negotiated with the Applicant and such negotiations had not taken place.

That no prior consultations on the reasons for the particular retrenchment and the manner of its implementation had been conducted and therefore the exercise was purely arbitrary and an entirely unilateral exercise of the Respondent. In particular, the individual employees were not consulted before being given the notices for termination.

The Applicant concluded that for the aforesaid reasons, the retrenchment exercise was both substantively and procedurally flawed and should not be permitted to proceed. If it does, the affected employees will be grossly and irrevocably prejudiced as follows:

i) They will loose their employment and their income with little prospects of any other legal remedy for more than two years due to the congested roll
of the Industrial Court;

ii) They will be terminated as temporary employees with all the disadvantages that this involves regarding remuneration, terminal benefits and loss of pension.

iii) They will irremediably loose their prospects and legitimate expectation of being confirmed to the pensionable establishment to which the Respondent had unequivocally agreed to do in the agreement of 21st June 1995 marked annexure *C to the Application.

Finally the Respondent has negligently allowed a situation to develop where pension contributions

have not been deducted from the Public Service Pension Fund and is not holding pension reserves in respect of these employees. The Respondent should therefore be compelled to fund or buy back the pensionable services of the daily paid so that they received pensions on termination of their services in terms of the Pension Fund Regulations.

The Respondent comprehensively and in a spirited manner responded fully to the case put forth by the Applicant. Mr. Maziya heavily relied on the issues raised as points in limine as follows:

1. That the Application is not urgent, the Applicant and the employees having been notified of the intended retrenchments on the 19th November 2004, but did not approach court until the 14th February 2005.

2.That there were material and genuine disputes of fact, regarding firstly,who the affected members of the Applicants were, and whether or not they had qualified to be converted to permanent and pensionable cadre in terms of the criteria agreed upon by the parties in 1995.

2.1 That in terms of the applicable law, where in motion proceedings there arose genuine disputes of facts, as in this case, an interdict, especially, a final one could not be granted without referring the matter to oral evidence.

For this proposition he relied on the authority Hebstein and Von Wissel, 4th Edition at page 1080 and Local and South African Case Law Interpreting the Relevant Rules of the High Court and the Supreme Court respectively.

3. Mr. Maziya, made hay of the fact that the Applicant union did not support its application with Confirmatory Affidavits of all the individual employees affected. He concluded that all the assertions by Mr. Quinton Dlamini regarding the qualification of its members to be converted into permanent and pensionable cadre were therefore unsubstantiated and amounted to bare hearsay that stood to be struck off as inadmissible.

4. Mr. Maziya further sought to distinguish the authority in the case of Vusumuzi Shongwe from the present case in that Shongwe's case was action proceedings where compensation for unfair termination was sought as opposed to the present motion proceedings where the main relief sought is a final interdict.

He added that in Shongwe's case there were no disputes of facts, the matter having been determined following filing of an agreed statement of facts that dispensed with viva voce evidence. Furthermore, qualification for conversion into permanent and pensionable cadre was not disputed in Shongwe's case as is the case presently.

He submitted that for the Applicant members to get an interdict they had to establish a right to conversion first and rather than seek an interdict to stop termination, they had to seek compensation in terms of the authority in Vusumuzi Shongwe's case. Furthermore, in Shongwe's case, he had approached the court personally but not the union.

In response to the arguments by Mr. Maziya, Mr. Dunseith for the Applicant submitted that the cases he relied on, of Vusumuzi Shongwe and one of Fourie v UYS 1957 (2) SA 125 at 128 contain principles of

law which he relied upon, but not the facts of the cases.

That the case of UYS was cited for the authority that, a party could not be compelled to give up his right because he had an alternative claim for damages. He emphasized that if the employees concerned were retrenched, they stood to loose their employment; pension and other benefits that their counterparts who had been converted into the permanent establishment enjoyed. That the meagre compensation provided under the Industrial Relations Act No. 1 of 2000 could not adequately compensate them for the loss they stood to incur if an interdict was not issued. He gave the example of Vusumuzi Shongwe, who the Industrial Court could not help to recover his pension because his services had already been terminated when the matter was heard notwithstanding that he was still employed when he first approached the court in the year 2000.

Mr. Dunseith further stated that he relied on the Vusumuzi Shongwe case for the authority that the employees described by the Principal Secretary, Ministry of Works and Transport in the notice of the 19th November 2004 as temporary, daily paids are infact, as a matter of law not temporary because they are protected by Part 5 of the Employment Act No. 5 of 1980.

The Principal Secretary could therefore only terminate their services in terms of Section 36 of the Act, and must satisfy the requirements of Section 42 (2) (a) and (b) of the Act, which he had not bothered to address. The other implication of the decision in Shongwe's case was that only the Civil Service Board (CSB) and not the Principal Secretary could terminate the services of the employees concerned.

It is very important in this case to note that the case of Vusumuzi Shongwe, was against the very same

Principal Secretary of Ministry of Works and Transport. He had instructed the Attorney General to defend that case and upon conclusion of the matter both parties were provided with the written judgements thereof on the 27th October 2004.

It cannot be said therefore that the Principal Secretary Ministry of Works and Transport was ignorant or oblivious of the legal status of the so called temporary 'daily paid' who had served government for considerable number of years.

This not withstanding he continued to categorize these particular employees as casual (temporary) labourers engaged in the temporary projects of the Ministry. He however conceded in the letter that "it is true and factual that a certain number of these employees were not on projects but were temporary due to lack of posts."

This is clearly no case of ignorance of the law, though ignorance of the law is no defence in any event. Clearly the Principal Secretary consciously refused to recognize the stated legal position regarding the so called temporary employees.

This he did to the detriment of government, without seeking to appeal the decision in the Shongwe case.

The court has carefully considered the arguments by both counsel and arrived at the following conclusions:

1. That the notice dated the 19th November 2004 naming for retrenchment about 300 employees listed in annexure CJMK13 to the Answering Affidavit is invalid for the following reasons:

(a) It gave the main reason for the intended redundancy to be that the employees affected are casual (temporary labourers) when as a matter of fact and law this was not the case.

(b) That it is common cause that many of the affected employees were skilled and semi-skilled employees but not labourers as stated in the notice some of whom had served government for up to thirty (30) years and more.

2. That the Applicant being the recognized union had the necessary legal standing to represent all the affected employees in seeking a declaratory order, regarding their status as employees of the Respondent, and to obtain an interdict thereof regarding the intended retrenchment due to take place on the 31st March 2005.

3. That there are no genuine disputes of fact that need to be resolved prior to determining the lawfulness or otherwise of the intended exercise.

4. That given the circumstances of the case outlined in the papers by both parties and in the very able submissions by both counsel, there was no undue delay in prosecuting this application given that from the 16th December 2004, to the 14th January 2005, the court and the Attorneys were on vacation and the action intended is due to take place on the 31st March 2005.

5. That the Applicant has established a clear right to the relief sought, and that its members are unlikely to be afforded substantial redress at a hearing in due course if required first to follow the

gamut contained under Part Vlll of the Industrial Relations Act No. 1 of 2000.

6. That the balance of convenience is in favour of granting the prayers sought by the Applicant and no real prejudice could be suffered by the Respondent by merely compelling it to follow the law, and abide by the agreements it had entered into with the Applicant.

Accordingly it is ordered as follows:

1. The retrenchment letters and exercise purporting to terminate the services of so called temporary employees as at the 31st march 2005 is set aside.

2. The Respondent is interdicted and restrained from retrenching the so called temporary employees who have qualified to be converted into the permanent and pensionable cadre, in line with the authority in the case of Vusumuzi Shongwe and The Principal Secretary Ministry of Works and Transport and 2 Others, without first confirming such employees in the permanent and pensionable establishment

3. The Respondent is directed in conformity with the Recognition Agreement between it and the Applicant and in conformity with the laws of the land with regard to the principles governing the redundancy and retrenchment of the so called temporary employees to engage the Applicant in bonafide consultations.

4. There will be no order as to costs.

The members agree.

NDERI NDUMA

JUDGE PRESIDENT INDUSTRIAL COURT