IN THE HIGH COURT OF SWAZILAND

Civ. Trial No. 301/1997

In the matter between:

S. F. T. U.	Plaintiff
Vs	
President of the Industrial Court & Another	Defendant
CORAM	S. W, Sapire, A C J
For Plaintiff	Mr. Dunseith
For Defendant	Mr. P. Simelane

Judgment

(10/02/97)

The Applicant is a federation duly constituted and registered in accordance with the provisions of the Industrial Relations Act of 1996 and has locus Standi to sue and be sued in terms of Section 37 (1) of the Act.

It is alleged by the deponent of the founding affidavit that the bringing of this application has been authorised. The applicant did not attach a copy of its Constitution nor a certificate of its registration as it should have done to complete the establishment of its locus stand. 1 however allowed a copy of the constitution to be filed from the bar and there appears to be no dispute apparently that the applicant is registered as a federation as it has alleged.

On Saturday 1st February 1997 the 2nd Respondent brought an urgent ex parte application before the Industrial Court of Swaziland in terms of the provisions of Section 70 of the Industrial Relations Act No 1 of 1996. A copy of the application is attached to the founding affidavit as annexure A

As appears from the notice of motion one of the aspects of relief sought was an interdict pendente lite restraining the Applicant from promoting the "Stay Away" which was scheduled to commence on 3rd February 1997 and also from participating therein. The interdict was to extend to the applicant's affiliated Trade Unions and their members individually. The Applicant, it cannot be argued otherwise, had an interest in the application as it foremost Was called upon to show why the relief claimed should not be granted and the rule nisi ,being the form in which the relief was originally claimed should not be confirmed.

It is conceded by the applicant that the respondents were justified in bringing, and entitled to bring the application ex parte. No point is made of the fact that the applicant Was not given notice of the intended application. The applicant, says it received a report that the application was to be made and instructed its attorney, Mr Dunseith to be present when the application was to be presented and moved.

In accordance with his instructions Mr. Dunseith was present at court when the respondent's representatives, including counsel from Johannesburg arrived to present and move the application. Mr Dunseith requested a copy of the papers from respondent's counsel, Mr Wise. On instructions from the Attorney General ,Mr Zwane, this request was declined.

Mr Dunseith managed to obtain a Copy of the papers from the registrar, and when the court, comprising the First respondent and two members had the matter called Mr Dunseith applied orally, (there having been no time or opportunity to prepare any written application to intervene), to intervene to oppose the granting of the order. Mr

Dunseith indicated that he Wished to raise an objection to the jurisdiction of the Industrial Court to hear and determine the application, and a further objection to the nature of the relief sought.

Mr Dunseith conceded that the 2nd respondent was entitled to have brought the application ex parte but argued that as he represented the party against which relief was claimed and was in court when the application was being moved albeit he had not received notice , he was entitled to be heard on the arguments he wished to raise.

Counsel for the Second respondent, surprisingly, opposed intervention by the applicant.. Having heard argument First respondent refused the applicant the right to be heard and made an order copy of which is attached to the founding papers..

Applicant's claim to a right to be heard is supported by the decision in SCHLESINGER v SCHLESINGER 1979 (4) SA 342 (W) in which it was held that, there is nothing inherently wrong or contrary to public policy in an interested party opposing an ex parte application which has come to his notice fortuitously or by informal notice: Rule of Court 6 (4) (b) provides for this very contingency. On principle any person who shows a direct and substantial interest in proceedings, and whose affidavit indicates that his opposition might contribute something to a just decision of the case, should not be deprived of an opportunity of being heard. In this case there was no opportunity for the Applicant to file an affidavit but clear indication was given that applicant wished to submit pertinent argument. In other circumstances this court would probably exercise its powers of review and set aside an order granted after a refusal by the court a quo to hear a person against whom relief was claimed, who was in attendance when the application was moved, and wished to be heard. Such a refusal by the court a quo offends our sense of fairness, and seems to be in flagrant contravention of the audi alterem partem rule, which is basic to our system of justice

In this case however there are reasons, why the court will not come to the

assistance of the applicant.

Firstly, and this is not the most important reason, is that the Applicant has brought this application as a matter of urgency seeking waiver of the usual requirements of the rules of court regarding notice and service of applications. The matter is alleged to be urgent " since certain interim relief has been granted against the applicant which seriously interferes and inhibits the applicant's freedom of

association and political expression". It is difficult to see how an interim order interdicting a prima facie illegal strike, and restraining the Applicant from promoting it or participating therein could impinge on the Applicants freedom of association or any legitimate right of political expression it may have.

There is no explanation as to why the Applicant waited six days before presenting this application.

During that period, it has ignored the order made by the industrial Court Which it now seeks to have set aside. I take judicial knowledge of the notorious fact, that Applicant has persisted in promoting the stay away, which started on schedule on 3rd February, two days after the granting of the order, and presently still Continues. In these circumstances I can see no urgency in reviewing the proceedings in the Industrial Court. The Applicant will doubtless raise its legal objections on the return day of the rule.

The respondent if it feels hampered by the interim order in the exercise of its legitimate rights may anticipate the return day as it could have done almost as soon as the interim order was granted. To come to Court as a matter of urgency to have an order which is being ignored in any event set aside seems to me to be an abuse of the process of the Court and a misuse of the urgency procedures.

Because the Applicant continues presently to be engaged in promoting supporting and maintaining the prima facie illegal stay away, quite apart from it being in contempt of the existing order of the Industrial Court, it does not come to this court with clean hands.

It could be argued that a party would not be in contempt of an order made, as in the present case, without affording the affected party an opportunity to be heard, especially where such party requested a hearing and was present at the time. It would seem however that as the order remains valid until it is set aside, it may not just be ignored. The Industrial Court implicitly found that it had jurisdiction in terms of Section 5 of the Act to entertain the application before it and to make the order it made. This however is not a matter for this court to decide and if the rule is confirmed, would be a matter for adjudication by the Industrial Court of Appeal.

Whether the applicant is in contempt of the order of the Industrial Court or not, no argument was advanced to demonstrate the legality of the promotion of the stay away. Mr Simelane who appeared for the Attorney General submitted to the contrary that if the stay away is a strike as envisaged by the Industrial Relations Act there is no suggestion that the procedures therein have been observed. No strike other than one permitted by the act and embarked upon in accordance with its provisions is legal, In promoting the stay away and its continuation, the applicant, as presently advised, appears to be committing not only a civil wrong against the proprietors of those industries, businesses and undertakings which may have been and are being adversely affected by the withdrawal of their labour forces and the stoppage of their services; in addition one or more criminal offences both at common law and in contravention of the relative Statute may Well have been committed . There appears to be no counter to this argument on the papers before me. However lofty or well intentioned its motives may be, for promoting and encouraging the stay away and obviously I do not comment on this at all, the applicant does not approach this court with clean hands.

It is not a case where the Applicant may have been guilty of some unacceptable conduct in the past, which rendered its hands unclean, but from which it had purged itself by at least desisting therefrom.

The illegal conduct is being persisted in even while this application was being heard.

The application cannot in these circumstances be entertained and is dismissed with costs

S.W. SAPIRE

ACTING CHIEF JUSTICE