IN THE HIGH COURT OF SWAZILAND

IN THE APPEAL COURT OF SWAZILAND

HELD AT MBABANE

CIV. APPEAL CASE NO. 3/1996

In the matter between:

REUBEN NDLANGAMANDLA & 91 OTHERS Appellants

and

SWAZILAND BREWERS LIMITED Respondent

CORAM:

Kotze' P.

Steyn J.A.

Tebbutt J.A.

Judgment (/4/96)

STEYN J.A.

Mr. Ndlangamandla (appellant) is the former Branch chairman of the Swaziland Manufacturing and Allied Workers Union. He alleges that he is authorised "to make ....(an) affidavit on behslf of (all 91) of the applicants" in the Court below.

The relief the appellant sought in the Court below is for the following order:

"(a) That the purported termination or dismissal of the applicants by the respondent was wrongful, invalid and unfair.

"(b) That the applicants are granted leave to institute separate proceedings before this Court for the proof of the damages suffered by each one of them as a result of the wrongful dismissal.

"(c) That each of the applicants be paid by the respondent the amounts as shown in the eighth column of schedule "A" of the founding affidavit being the total of notice pay, additional notice pay and severance allowance made up as shown in the fifth, sixth and seventh columns respectively of schedule "A".

"(d) Interest, a tempore morae, at the rate of nine percent per annum from the date of 14th November, 1989 to date of payment."

The application was opposed by the respondent. After hearing argument the Court a quo, (Sapire J. presiding) made the following order:

"The application is dismissed with costs to be paid jointly and severally by each of the applicants."

The Court also embargoed the institution of further proceedings by any of the applicants against the respondent. It is against the dismissal of this application that appellants' appeal to this court.

The facts are briefly summarised in the judgment of the court a quo as follows:

"The facts and circumstances giving rise to these claims are as follows:

The applicants are all former employees of the respondent and the SWAZILAND MANUFACTURING AND ALLIED WORKERS UNION (SMAWU). In 1989 an industrial dispute arose between SMAWU and the respondent. The Union was the applicant's representative in the dispute which concerned the respondents' refusal to replace or remove one of its employees, of whom the applicants disapproved.

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The dispute remain unresolved notwithstanding the reconciliation procedures adopted in accordance with the INDUSTRIAL RELATIONS ACT NO. 4/1980. By March 1990 the INDUSTRIAL COURT had dealt with an application by SMAWU for an order:-

"that the court orders the respondent to reinstate all the locked out workers immediately and unconditionally"

In refusing the Order the President of the Court outlined the events which eventually led SMAWU to make that application. As the judgment is annexed to the Replying Affidavit I do not propose to quote extensively therefrom. It is quite clear that the court was dealing with the same dispute as is now before this Court".

The Court then went on to hold that:

"The final decision of the Industrial Court adverse to the applicants on issues common to that case and to this is a bar to the granting to the applicants (of) the relief they presently claim. The proceedings in the Industrial Court were between the same parties as those now before court. The relief claimed and the issues canvassed in the earlier case a re-identical with those now advanced and raised in this application."

The court then held that "the applicants would have to succeed on claim (a) in the notice of motion... to entitle them to the relief claimed in (the) remaining prayers. The issue is whether the termination by the respondent of its employment of the applicants on 14 November 1989 was lawful or not".

It was these findings which were the subject of challenge by appellants' counsel before us. This contentions can be summarised as follows:

Insofar as the ancillary relief claimed is concerned, counsel contended that this relief was not necessarily consequent upon the finding that the strike was unlawful, the dismissal justified and that there was

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therefore no "lock-out". It had to be adjudicated upon independently. I will deal with this submission later in the judgment.

Concerning the invocation of the plea of res judicata and the court a quo upholding such plea, counsel contested the validity of . this finding on the basis that it was not necessary for the Industrial Court to have decided the issue concerning the lawfulness or unlawfulness of the strike for it to determine

whether there had been a lock-out or not.

This contention cannot be upheld. The decision which the Industrial Court made was indeed one which on the facts before it required it to rule on the lawfulness or not of the strike and the lawfulness of the dismissal of the applicants.

The judgment of the Industrial Court in this regard reads as follows:

"I now turn to the next question as to whether the applicant had acted contrary to law when it took out its members on strike on 14/11/89. In this connection I wish to refer to Section 64(11).

"No party to a dispute may continue, or take strike action or institute a lock-out while proceedings, in relation to a dispute to which that action relates are pending before the Court."

"It is common cause that the application in Case No. 95/89 was filed on 9/11/89 after the Union had given strike notice on 8/11/89, that it would be taking out its members on strike on 10/11/89. The Notice of this application was served on the Union on the same day. The Union then called off the strike but later give fresh strike notice for 14/11/89. The applicant Union however appeared in Court on 13/11/89 and filed its objection to the issues raised in the said application and the matter was fixed for Inquiry on 17/11/89. Meanwhile on 14/11/89, the workers belonging to the applicant Union went on strike.

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Therefore on 13/11/89 the Union was fully aware that there was a case pending against it in Court,brought by the Company, for determination on the matters related to the disputes. Despite this on 14/11/89 the union took out its members on strike, thereby contravening the provisions of Section 64(1). As such the Court has no other alternative but to hold that the strike action 14/11/89 was unlawful.

The Company then terminated the striking workers on 14/11/89 under Section 62(c) and in my view the Management was justified in its action."

A reading of these passages in the judgment clearly demonstrates that the Industrial Court was obliged to rule on the question as to whether or not the applicants had been lawfully dismissed. If they had not been so dismissed the applicants would indeed have been locked out, would have been entitled either to reinstatement or to damages - if reinstatement could not have been validly ordered - and to the ancillary relief they now claim in this action.

The Court a quo was therefore manifestly right in directing that the relief claimed in paragraph (a) in the notice of motion before him had already been adjudicated upon between the same parties in another court.

In so far as the claim for ancillary relief is concerned it is clear from the passage cited that the Industrial Court found that management was "justified in its action" (in dismissing the striking workers).

This finding may, however, not have been necessary for the purpose of determining the dispute which had to be adjudicated upon by the Industrial Court. It was seized only with the obligation to rule on the question whether the strike was lawful or not. It was not called upon to decide whether the monetary amounts now sought by the appellants in respect of notice pay, additional notice pay and severance allowance were or were not due and payable in spite of the lawfulness of the dismissal. Neither is the entitlement to these amounts necessarily forfeited because appellants were lawfully dismissed.

It follows that the finding of the Court a quo that "applicants would have to succeed on Claim A in the Notice of Motion.... to entitle them to the relief claimed in (the) remaining prayers" was legitimately challenged on appeal.

Sections 33(7) and (8) of the Employment Act 1980 appears to be the sections which are applicable in cases of summary dismissals. These two subsections read as follows:

"(7) Nothing in this section shall prejudice the right of the employer to dismiss an employee summarily for just cause and any employee who is dismissed for just cause shall be paid the wages due to him up to and including the date of such dismissal."

"(8) An employee shall not be dismissed without notice unless the reasons for his dismissal are such as to warrant the immediate cessation of the employer/employee relationship and where the employer cannot be expected to take any other course."

Having regard to all the circumstances surrounding the industrial action by the appellants, the warning issued by the respondent, the fact that they embarked upon strike action despite the Industrial Court being seized of the matter, in my view justified the summary dismissal of the appellants and brought the dismissals squarely within the ambit of Sections 33(7) and (8) of the Employment Act of 1980.

I should add in conclusion that it was established in the Court below that the appellants had attempted to challenge the Industrial Court's decision on review in 1992. On the 7th of February 1992 Rooney J. ruled that there was an unreasonable delay in instituting review proceedings. To seek to reopen these proceedings in 1995 by way of the present application was ill-advised and bordered on abuse. In these circumstances the Court a quo was perfectly justified in making the protective order of costs which it did.

For these reasons the appeal is dismissed with costs.

(Signed)

J.H. STEYN

(Signed)

G.P.C. KOTZE' P. : I Agree

(Signed)

P.H. TEBBUTT J.A. : I Agree

Delivered in Court on this 13th day of April 1996.