

IN THE HIGH COURT OF SWAZILAND

THE ATTORNEY GENERAL

Applicant

And

SWAZILAND POLICE UNION

Respondent

In Re:

KHANYAKWEZWE ALPHEUS MHLANGA

1st Applicant

SWAZILAND POLICE UNION

2nd Applicant

And

THE COMMISSIONER OF POLICE

1st Respondent

THE PRIME MINISTER OF SWAZILAND

2nd Respondent

THE COMMISONER OF LABOUR

3rd Respondent

THE ATTORNEY GENERAL

4th Respondent

Civil Case No. 341/2007

Coram

S.B. MAPHALALA - J

For the Applicant

MR. M FAKUDZE - Deputy

Attorney General

For the Respondents

MR. T. MASEKO

JUDGMENT

15th February 2007

[1] The Attorney General representing the Commissioner of Police has filed an urgent application before this court for an order in the following terms:

1. Dispensing with the forms, time limits and manner of service provided for by the rules of this Honourable court and hearing this matter as one of urgency.

2. A rule *nisi* do issue calling upon the Respondent to show cause, if any, on or before the 23rd February 2007, why it should not be ordered that:

(a) Pending the outcome of the constitutionality of the impugned legislation; interdicting and restraining the Respondent from recruiting members of the Royal Swaziland Police (RSP) Force, convening meetings within police formations and interfering with the central and internal communication system of the RSP.

(b) Paragraph (a) of the rule *nisi* to operate with immediate effect.

(c) The Respondent is at liberty to anticipate the return date on 24 hours notice to the Applicant.

3. Further and/or alternative relief.

[2] This application is founded on the affidavit of the Commissioner of Police, Mr Edgar Hillary himself where he relates in great detail the history of the matter and certain averments proving urgency.

[3] The Respondents have filed an answering affidavit raising points *in limine* and also addressing the merits of the matter. I heard very interesting arguments from both counsel. This judgment therefore is concerned only with the preliminary objections advanced by the

Respondents.

[4] The said points *in limine* reads as follows:

In limine

4.1 ***Lis pendens***

4.1.1. I am advised and verily believe that the matter is ***lis pendens*** hence this Honourable court may not entertain it as it is already before court between the same parties based on the same cause of action in the main application.

4.1.2. I am advised and verily believe that the cause of action on which this application is founded is misplaced as the Applicant relies on **Regulations 19 of the Police Regulations of Act 29 of 1957**, which regulation is ***prima facie*** unconstitutional.

4.1.3. The Respondent has already said so in its replying affidavit in paragraph 12.1 at page 4 in relation to the main application.

4.2 **Requirements for an interdict**

4.2.1. The respondent is advised and verily believes that the Applicant has failed to show a clear right to **stop** and **interdict** the exercise of fundamental rights enshrined in the supreme law of the land.

4.2.2. The clear right that the Applicant purports to rely on under the Regulations, standing orders and Proclamations cannot stand against constitutional master of supremacy and constitutionality.

[5] I shall address the above points *ad seriatim* hereinunder thusly:

(i) Lis pendens

[6] The argument in this regard on behalf of the Respondents is that this matter is *lis pendens* hence this court may not entertain it as it is already before court between the same parties based on the same cause of action in the main application. The Swaziland Government which is the Applicant has taken the position that this is not so. It appears to me that the answer to this question lies in the legal definition of *lis pendens*. According to the learned author *Herbstein and*

Van Winsen, The Civil Practice of the Supreme Court of South Africa, 4th edition at page 249 if an action is already pending between parties and the Plaintiff brings another action against the same Defendant on the same cause of action and in respect of the same subject matter, whether in the same or in a different court, it is open to the Defendant to take the objection of *lis pendens*, that is, that another action respecting the identical subject matter has already been instituted, whereupon the court in its discretion may stay the second action pending the decision of the first. The learned authors further state at page 249 thereof that the requisites of a plea of *lis pendens* are the same with regard to the person, cause of action and subject matter as those of a plea of *res judicata* which, in turn, are that the two actions must have been between the same parties or their successors in title, concerning the same subject matter and founded upon the same cause of complaint.

[7] In the present case it is common cause that in the main application which will be heard tomorrow the same parties are before court and the same subject-matter is before the court. It appeared to me when the matter was argued by Counsel yesterday that the Government is jumping the gun by bringing this application when there is already an application before court on the same subject-matter. After hearing all the arguments in this regard I have come to the considered view that indeed this matter is *lis pendens* and that it is important that the main matter be heard on the various arguments on the Constitution where certain statutes are being challenged for being unconstitutional. I have also considered that the main application will be before court tomorrow to determine the matter in its fullness. In the result, for these reasons I find that this point *in limine* is to be upheld.

(ii) Requirements for an interdict.

[8] The arguments in this regard is that the Applicant has failed to show a clear right to stop and interdict the exercise of fundamental rights enshrined in the supreme law of the land. The clear right that the Applicant purports to rely on under the regulations, standing orders and Proclamations cannot stand against constitutional master of supremacy and constitutionality.

[9] The argument for the Respondents is based on the legal requirements for a temporary

interdict as stated in the textbook by *CB Prest S.C. Interlocutory Interdicts* at page 54 that the statement of the requirements by Corbett J (as he then was) in the case of *Boshoff Investments (Pty) Ltd vs Cape Town Municipality 1969 (2) S.A. 256 © at 267 A - F* is as follows:

"Briefly the requisites are that the Applicant for such temporary relief must show:

- (a) that the right which is the subject matter of the main action and which he seeks to protect by means of interim relief is clear or, of 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;
- (c) that the balance of convenience favours the granting of interim relief; and
- (d) that the Applicant has no other satisfactory remedy"

[10] It would appear to me on the facts of this case that clearly the Applicant has not proved the last requirement (d) that the Applicant has no other satisfactory remedy and on their admission when the matter was argued yesterday it became clear that the Applicant can call each member of the Swaziland Police Union and issue whatever directive as the employer of such a police officer. This has been done to one member of the union.

[11] In the result, for the afore-mentioned reasons the points *in limine* are upheld with costs.

S.B. MAPHALALA

JUDGE