IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE CASE NO. 171/2000

In the matter between:

HANSON NGWENYA & 66 OTHERS APPLICANTS

and

SWAZI OBSERVER (PTY) LIMITED RESPONDENTS

CORAM:

NDERI NDUMA: PRESIDENT

JOSIAH YENDE: MEMBER

NICHOLAS MANANA: MEMBER

MR. E. M. HLOPHE: FOR THE APPLICANTS

MR. L. MAMBA: FOR THE RESPONDENT

RULING

13.06.2000

This Application was brought on the 7th June, 2000 under a certificate of urgency seeking for orders;

1. Setting aside the normal Rules of Court relating to service, form and time limits and hearing this matter as one of urgency.

2. Declaring the termination of the services of all the Applicants herein wrongful, unlawful, unfair and unreasonable in all the circumstances.

3. Directing the Respondent to pay all the Applicants herein a special award of 12 months compensation in lieu of reinstatement.

4. Directing the Respondent to pay all the Applicants herein 24 months maximum compensation for unfair dismissal of all the Applicants herein from their employment.

5. Interdicting and restraining the Respondent from disposing of any or all of its property by either sale, alienation, gift, donation transfer or and in any other manner whatsoever pending the finalisation of the present application.

6. That a rule nisi do hereby issue calling upon the Respondent to show cause on a date to be determined by this Honourable court why prayers 2, 3, 4 and 5 should not be made final.

7. That prayer 5 of the above mentioned rule nisi operate as an interim interdict with immediate effect pending the final determination of the present application.

8. Costs on an Attorney-client scale but only in the event of this application being opposed.

9. Any further and/ or alternative relief.

The Application is founded on the Affidavit of Hanson Ngwenya and the confirmatory Affidavits of the Sixty Six (66) Applicant's herein.

The Respondent has raised objection in limine to the Application from the bar as follows:

1. There is no urgency in the Applicant's Application to justify setting aside the usual requirements of the rules of this Honourable Court regarding notice and service of applications.

2. The Applicants have sought to have a trial by way of an application in a blatant disregard of the court rules.

3. The court has no jurisdiction to restrain the Respondent from disposing of its property.

4. The Applicants have not satisfied the pre-requisites of granting an interim interdict they have sought.

As concerns the issue of urgency and the preliquisites for interim relief the Applicants have set out the basis of the urgency in paragraphs 79 to 89 of the Founding Affidavit of Mr. Hanson Ngwenya.

According to the Applicants, the issues giving rise to the urgency in brief is that the Respondent has embarked on an exercise of disposing off its assets comprising of motor vehicles, computers and photocopiers which the Applicants allege constitute their only security against the Respondent should the court award them substantial compensation for unfair dismissal and special awards in lieu of compensation when this Application is finally determined. The Applicants allege that the total claims amount to no less than two Million Emalangeni.

The reasons advanced though considered in isolation arouse a sense of urgency, the orders sought for interim relief would in due course be futile if the substantive application by the Applicants is not well founded and without probability of success.

It therefore follows that the primary consideration by the court is whether the Applicants have any possibility of success in their claims for compensation for unfair dismissal and special awards in lieu of reinstatement on an urgent Notice of Motion founded on one Affidavit that only discloses facts leading to the dismissal of the Applicants but completely says nothing about the employment history, the terms and conditions of service and other personal particulars of the sixty seven (67) Applicants. Put it another way, has the Applicant established a prima facie right to the relief sought taking into consideration the substantive prayers sought?

The Applicants' Attorney Mr. Emmanuel Hlophe submitted that the aforesaid claims by the Applicants may be determined purely on the basis of the papers filed of record, that there is no need to lead any oral evidence as there are no factual issues to be determined. He emphasized that the claims' success depended wholly on determination of legal issues and he had no intention of instituting action proceedings therefore in respect thereof.

It is note worthy that the Applicants were retrenched on the 18th February 2000 by a notice of redundancy served on them the same day. In a meeting held on the 9th March 2000 between the union representative of the Applicants (SMEPAWU), and the Respondent's representatives, the issue of terminal benefits was resolved, and the parties agreed to disagree on the claims for compensation for unfair dismissal. The matter was then reported to the Labour Commissioner in terms of Section 41 (1) of the Employment Act who was unable to resolve the dispute.

The Labour Commissioner then issued an undated full Report of Dispute in terms of Section 41 (3) of the

Act.

The Founding Affidavit does not disclose when this report was issued to the Applicants by the Labour Commissioner.

Section 41 (3) reads as follows:

"If the Labour Commissioned is unable to achieve a settlement of the complaint within twenty one days of it being filed with him, the complaint shall be treated as an unresolved dispute and the Labour Commissioner shall forthwith submit a full report thereon to the Industrial Court which will then proceed to deal with the matter in accordance with the Industrial Relations Act".

The undated full-report by the Labour Commissioner was not forwarded to the court in

terms of Section 41 (3) of the Act but has been annexed to the urgent Application and marked "D".
In terms of this report the final issues in dispute are:

"1. 12 months compensation in lieu of re-instatement.

2. 24 months maximum compensation for unfair dismissal".

For the court to injuct the respondent in terms of the Notice of Motion, we must first be satisfied that there is before us an application with probability of being resolved on the papers filed of record in favour of the Applicants without recourse to a trial on facts. If this be so, then the Applicant would have established a prima facie right to the relief sought.

In terms of Section 15 of the Industrial Relations Act No. 1 of 1996 which is preceded by a subheading as follows "Remedial powers of court in cases of dismissal, discipline or other unlawful disadvantage", and in particular subsection 15 (4) states:

"where the services of an employee have been unlawfully or unfairly terminated, an award of compensation.....shall be awarded by the court as it considers just and equitable in all the circumstances having regard to the loss sustained by the employee in consequence of the termination in so far as the loss is attributable to action taken by the employer and the extent, if any, to which the employee caused or contributed to the termination and without prejudice to the generality of the foregoing, the court shall have regard to:

(a) the actual and future loss likely to be suffered by the employee as a result of the termination, including the loss of any benefits connected with the employment which are capable of being expressed in terms of money;

(b) the age of the employee;

© the prospects of the employee obtaining other equivalent employment;

(d) the circumstances of the termination. "

It is the court's well considered view that all the above factors are factual in nature which have not been canvassed ex-facie the founding affidavit and the confirmatory affidavits of the Applicants.
The Applicants have no probability of success in their substantive claims for

compensation in terms of the Industrial Relations Act. It cannot be said therefore that the Applicants have

established a prima facie right to entitle them to the interim relief sought.

In our respectful opinion the manner in which this Application has been brought is nihilistic to put it more mildly. We do not see what possible purpose an interim order to secure the interests of the Applicants would serve in the circumstances of the case therefore.

As we stated in the matter of Themba Vilakati and the City Council of Manizni, Industrial Court of Swaziland Case No. 129/98.

In terms of Rule 3 (1) (b) of the Industrial Court Rules 1984:

"Any person who makes an application to the court shall in case of an unresolved dispute falling under Section 58 or 60 of the Act, make such application in the manner set out in Form B of the schedule hereto ".

We must note that the rules make references to Section 58 or 60 of the repealed Industrial Relations Act No. 4 of 1980 and the same should now be read as referring to Section 65 or 67 of the Industrial Relations Act No. 1 of 1996.

In terms of Form B, the Applicant is to set out the nature and full particulars of each item of the claim involved in the dispute. Needless to say, action proceedings follow thereafter and in terms of Rule 7 (2), oral evidence is to be led, though evidence by Affidavit may be admissible before the court in its discretion.

The Applicants have failed to establish any reasonable ground why they should not follow the rules of the court and be afforded relief in due course.

Indeed it is in the interest of the Applicants that this Application be dismissed and if they so wish, file a proper Application in terms of the Rules of the Court. Were it not for other considerations, this is an appropriate case where costs debonis propris should be ordered.

There will be no order as to costs.

The members agree.

NDERI NDUMA

JUDGE PRESIDENT - INDUSTRIAL COURT