

**IN THE INDUSTRIAL COURT OF SWAZILAND**

**HELD AT MBABANE**

**CASE NO. 182/05**

In the matter between:

**JOHN B. DLAMINI**                      **1<sup>ST</sup> APPLICANT**

**SIFISO MASEKO**                      **2<sup>ND</sup> APPLICANT**

and

**THE MALL SUPER SPAR**              **RESPONDENT**

**CORAM**

N. NKONYANE : ACTING JUDGE

DAN MANGO: MEMBER

GILBERT NDZINISA: MEMBER

FOR APPLICANTS: MR. M. GINA

FOR RESPONDENT: MR. J. HENWOOD

RULING 20.06.05

The applicants are both employees of the respondent.

They brought this application to court on an urgent basis and are seeking an order in the following terms :-

- " 1. Dispensing with the usual forms and procedures and time limits relating to the institution of proceedings and allowing this matter to be heard as a matter of urgency, and further wanting the usual requirements of the Rules of the court regarding notice and service of application in view of the urgency.*
- 2. That the respondent be ordered to re-instate the applicants to their initial job positions, pending the reviewal of the Labour Commissioner's opinion on their changed terms and conditions of their employment by the Labour Commissioner or the Industrial Court as the case may be.*
- 3. That the respondent be ordered to pay all benefits that would have accrued in the employment of the applicants had they not been denied to work which was in compliance with the Commissioner of Labour's opinion.*
- 4. That the respondent be further ordered to withdraw any suspension and pending disciplinary actions against applicants which emanates from their compliance with the Labour Commissioner's opinion.*
- 5. Interdicting and restraining the respondents from any further actions preventing the applicants from exercising their duties as cashiers.*
- 6. Declaring the conduct of respondent towards the applicant as amounting to an abuse of power.*
- 7. That all prayers above operate with immediate interim effect pending the return date to be appointed by the Honourable court.*
- 8. That cost is awarded against the respondent in the event that this application is opposed.*
- 9. Granting further and or alternative relief."*

The application is supported by the founding affidavit deposed to by John Bongani Dlamini and the confirmatory affidavit by Sifiso Maseko.

The respondent filed an answering affidavit and the applicants replicated.

Although the matter came before the court on 06.06.05 it was finally argued on 13.06.05.

The applicants' evidence was that they were transferred from their positions of cashiers to be shop assistants. They were not happy about the transfers and they sought the opinion of the Labour Commissioner on the matter in terms of section 26 of the Employment Act No.5 of 1980.

The Labour Commissioner responded and his opinion was that the transfers were unfair and unlawful.

The applicants therefore resisted the transfers on the basis of the Labour Commissioner's opinion that the transfers were unfair and unlawful.

The 1<sup>st</sup> applicant in paragraph 14 of the founding affidavit said on 31.05.2005 he was indefinitely suspended pending the outcome of a review of the Labour Commissioner's opinion.

In paragraph 18 it is stated that the matter is urgent because the respondent intends to initiate a disciplinary hearing against the 2<sup>nd</sup> applicant on 08.06.2005.

On behalf of the respondent it was argued that in terms of the job descriptions of the applicants, the management had the right to redeploy the workers from time to time as the business may dictate.

It was argued that the applicants were being temporarily redeployed to the bakery department, as there was a shortage.

The court was also told that one of the applicants, the 1<sup>st</sup> applicant was becoming unruly and that his behaviour was detrimental to the respondent's business.

From the papers filed in court and from the arguments by the representatives of the parties it became clear to the court that the issues involved are very simple and should have been dealt with at shop floor level.

The matter, which is central to this application, that is, the lawfulness or otherwise of the transfers, is presently before the Labour Commissioner as the respondent applied for a review of the opinion.

Furthermore, there was a dispute as to whether the movement of the 1<sup>st</sup> applicant from the till to the bakery department was a transfer or a redeployment. The court will be unable therefore to make a ruling whether the suspension was lawful or not because the issue of the matter of the movement was also referred to the Labour Commissioner in the application for review.

It follows that the court will not be in a position to make a ruling as asked by applicants' representative, as to what would happen in the meantime whilst the respondent has applied for a review. If the court does so, it will mean that it has decided that the applicants were transferred, whereas the question whether their removal was a transfer or not is pending before the Labour Commissioner.

Good sense dictates however that the applicants should take the orders of the employer, more so because in terms of their job descriptions, the employer has a right to ask them to help in other departments from time to time as per the requirements of the business.

If there are shop stewards at the respondent's workplace, the court would urge them to be seen to be functioning. We reiterate that this was a matter of simple misunderstanding between the social partners, which should not have ended in court.

It seems that the matter was prematurely brought to court by the applicants whilst it was still pending in the office of the Labour Commissioner. It is also worth noting that the applicants were aware that the respondent had applied for the review of the opinion.

This court will not interfere with the lawful duties of the Labour Commissioner in terms of the Employment Act.

The application is accordingly dismissed with no order as to costs.

The members agree.

**N. NKONYANE**

**ACTING JUDGE - INDUSTRIAL COURT**