IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 419/04

In the matter between:

SWAZILAND ELECTRICITY BOARD APPLICANT

And

SWAZILAND ELECTRICITY SUPPLY

MAINTENANCE AND ALLIED

WORKERS UNION & 7 OTHERS RESPONDENT

CORAM

N. NKONYANE: ACTING JUDGE

G. NDZINISA : MEMBER

D. MANGO: MEMBER

FOR APPLICANT: MR. M. SIBANDZE

FOR RESPONDENT: MR. P. DUNSEITH

J U D G E M E N T 14.11.2005

This matter came before the court as an urgent application. It was argued on 09.03.05 after which the court reserved its judgement.

The matter involved a strike action by the workers of the applicant who are members of the 1st respondent. By the time the matter was argued in court the strike had long ended. The delay in

handing down the judgement was therefore deliberate as there was no longer any urgency, and the court wanted to dispose of other matters before it.

There were preliminary objections raised on behalf of the respondents. The first objection related to the citation of the office bearers of the union. It was argued that their legal status did not appear from the citation and that their citation was unnecessary and wrong. The court was referred to HEB**STEIN AND VAN WINSEN: "THE CIVIL PRACTICE OF THE SUPREME COURT OF SOUTH AFRICA (1997) 4th EDITION AT PAGE** 130 where it is stated that if

a person is being sued in a representative capacity, that should be made clear and

it

the words in his capacity as should be added after that person's name.

Section 11 (1) of the Industrial Relations Act No.l of 2000, however states that, "The court shall not be strictly bound by the rules of evidence or procedure which apply in civil proceedings and may disregard any technical irregularity which does not or is not likely to result in a miscarriage of justice."

It is the conclusion of the court that the failure to state that the 2nd-8th respondents are cited in their representative capacities is a technical irregularity, which does not or is not likely to result in a miscarriage of justice. This objection is accordingly dismissed.

The second objection related to new evidence introduced by the applicant's replying affidavit. It was argued that the applicant was not entitled to introduce new evidence in **its** replying affidavit, as the respondents will not have a chance to respond. It **was** further argued that the applicant must establish its case in its founding affidavit. This objection will be upheld by the court, as the respondents will be clearly prejudiced by the introduction of the new evidence in the applicant's replying and supplementary affidavits. Accordingly paragraphs 25-35 will be struck **out together** with annexure "PG2".

Further, the parties also agreed that paragraphs 19.2 and 19.3 of the replying affidavit be struck out.

On the merits of the application, what remains for the court to decide is whether the conduct of the workers amounted to a strike, and if so, was it a protected/lawful strike.

***BACKGROUND FACTS*:-**

On 22 December 2004 a number of the applicant's workers congregated at the applicant's head office in Mbabane with the intention of having audience with management. The workers were accusing the management of failing to buy work materials on time or at all. They said this was impacting on the delivery of services to customers. The second grievance that they wanted to address was the announcement by management that the workers were not going to be paid bonus.

These two issues were discussed by the workers in their meeting held on 18 December 2004. It was in that meeting that they resolved to go to the head office and request the acting Managing Director to give them an explanation on those two issues.

The issue of the bonus had earlier been referred to the Conciliation, Mediation and Arbitration Commission (CMAC). CMAC made a ruling that the applicant was not obliged to pay any bonus, and that the applicant had a discretion to do so after having assessed its financial position.

After the acting Managing Director had addressed the workers and told them that the company was bankrupt and could not afford to pay any bonus that year the workers did not leave the premises. The acting Managing Director asked them to leave and come back on the following day as he said he was going to consult with the Board. The applicant denied that it told the workers to return on the following day. The court will accept the applicant's version that it did not tell the workers to return. The court will take the view that it was highly unlikely that the applicant would encourage the workers to unlawfully abandon their work.

On the following day the workers converged again. The union executive members were on that day served with the urgent application. The workers thereafter dispersed as the executive had to attend court at 2.30 p.m.

APPLICANT'S CASE *-*

It was argued on behalf of the applicant that the workers were engaged in a strike action, and that such strike was unlawful. It was argued that the strike was also unlawful because the workers were employees of an essential service provider and therefore prohibited from engaging in a strike action.

RESPONDENTS' CASE:-

On behalf of the respondents it was argued that the workers were not on strike. It was argued that the workers were only reacting to the conduct of the applicant of failing to buy material. It was argued that the workers conduct could, at the least, amount to a breach of contract. Mr. Dunseith argued that in order for a work stoppage to amount to a strike, it must be shown that the workers did not intend to resume work until their demand was met. He pointed out that on the applicant's papers there was no allegation or evidence of persistence on the part of the workers.

The court was referred to the cases of **SMALL AND OTHERS V. NOELLA CREATIONS (1986), ICD (1) 264; AND MEDIA WORKERS ASSOCIATION OF S.A. AND OTHERS V. FACTS INVESTORS GUIDE**

AND ANOTHER (1985), ICD (1) 210 as authority for the proposition that the refusal to work must be shown to be intended to persist until the demand is met.

THE LEGAL ISSUES:-

The Industrial Relations Act defines a strike as;

A complete or partial stoppage of work or slow down of work carried out in concert by two or more employees or any other concerted action on their part designed to restrict their output of work against their employer, if such action is done with a view to Mucins compliance with any demand or with a view to inducing the abandonment or modification of and demand concerned with the employer — employee relationship " (my underlining).

From this definition one can extract the following criteria if a work stoppage is to be deemed a strike; one, there must be a stoppage of work or slow down of work; two, by two or more employees; three, done with a view to induce compliance with a demand; four, the demand must be a matter of mutual interest between the employer and employee.

The cases to which the court was referred to were South African authorities. The courts in those cases were interpreting the definition of strike in the Labour Relations Act No.28 of 1956, which is not worded in the same manner as the local Act.

It seems to us that the important requirement for a work stoppage to be deemed a strike, is that there must be a demand. The workers must have engaged in the work stoppage with the purpose of persuading and not forcing, the employer to comply with their demand.
It is important to take into account that an employer also has the right to 'lock out' his employees. This means that an employee cannot force an employer to agree to his demand. The employer has the ultimate sanction to shut down the plant, as it is his property and the employee has a corresponding sanction to refuse to work.

The court will therefore come to the conclusion that it is not a requirement in the local Act that the refusal must be shown to be intended to persist until the demand is met. The tenor of the definition of a strike in the local Act is that the work stoppage must be done with a view to persuade the employer to comply with the demand.

JOHN GROGAN: "WORKPLACE LAW" (2005) 8th EDITION AT PAGES 382-383 points out that "the duration or extent of the stoppage is irrelevant; Partial strikes such as work-to-rules, go-slows, and 'grasshopper' (intermittent) stoppages also amount to strikes." At page 385 the author states "even a demand that management attend a meeting is sufficient."

The evidence before the court revealed that the union wrote a letter to the acting Managing Director "alerting him that he was required to address workers at Head office on the following day." (Paragraph 8.4 of the answering affidavit). Clearly that was a demand on the part of the

workers, and the grievance that was in existence was the non-payment of the bonus pay to the workers.

The workers held a meeting and resolved to go and assemble at the applicant's head office. From the evidence before court it is clear that their intention was to persuade the applicant's Board to reconsider its decision concerning the bonus
pay.
It was not in dispute that the applicant company was an essential service provider. In terms of section 91 of the Industrial Relations Act, an employee of such an establishment is prohibited from taking a strike action.

Taking into account all the evidence before the court the court will come to the conclusion that the conduct of the workers constituted a strike action and that the strike action was unlawful and that is the judgement that the court makes.

No order for costs is made.

The members agree.

N. NKONYANE

ACTING JUDGE-INDUSTRIAL COURT