IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE **CASE NO. 42/09**

In the matter between:

SWAZILAND PROCESSING REFINING AND ALLIED WORKERS UNION **1st APPLICANT**

PETROS HLATSHWAYO AND 27 OTHERS **2nd APPLICANT**

And

CHUAN YI PAPER (PTY) LTD **RESPONDENT**

CORAM:

N. NKONYANE D. **JUDGE MEMBER**

MANGO G. NDZINISA **MEMBER**

FOR APPLICANTS FOR RESPONDENT **MR. M. GINA MR. S. MNISI**

JUDGEMENT 20.02.09

[1] This is an application brought to court on a certificate of urgency by the applicants against the respondent for an order in the following terms;

"1. Dispensing with the normal provisions of the rules relating to service and hearing this matter as a matter of urgency.

a) *Declaring that the obtaining strike action by the 2nd applicants is legal and protected in terms of section 86 of the Industrial Relations Act No. 1 2000 as amended.*

b) *Interdicting and restraining the respondent from intimidating, victimizing the 2nd applicants by threatening to dismiss them for exercising their legal right to participate in a legal Industrial Action.*

c) *Declaring that any disciplinary action taken against the 2nd*

applicants is unlawful, null and void if it based only on their participation in the Industrial Action.

d) *Declaring the purported dismissals of the 2nd applicants under the misguided belief that they participated in an illegal strike null and void.*

e) *That; prayers 2, 3, 4, and 5 herein above appeared with immediate and interim effect pending the outcome of this matter.*

f) *Granting applicant the costs of this application.*

8. Granting applicant any further or alternative relief."

[2] The application is opposed by the respondent. The respondent filed its answer to the applicants' founding affidavit in a document that it incorrectly referred to as a 'replying affidavit'. In its papers the respondent raised three points *in limine.* The jurisdiction of the court is not in issue. The essence of the points raised is that the application should not have been brought on a certificate of urgency. The court therefore allowed the parties to argue the points of law raised together with the merits of the case so that it can make a final judgement on the matter.

[3] The evidence before the court showed that the 2nd applicants are members of the 1st applicant, a trade union duly recognized by the respondent. The 2nd applicants are employees of the respondent. The respondent is a company duly registered in terms of the company laws of the country carrying on business at Hlathikhulu in the Shiselweni District.

[4] The parties engaged in wage negotiations which started in March 2008. They failed to reach an agreement on the issues tabled. The matter was reported to CMAC as a dispute. Even there the matter could not be resolved. A certificate of unresolved dispute was

accordingly issued by the Commission. The 1st applicant thereafter caused a strike notice to be issued to the respondent in accordance with Section 86(2) of the Industrial Relations Act, 2000 as amended, ("the Act").

[5] The Commission, as required by the Act sent its Commissioner to go and supervise a ballot exercise before the workers could embark on a strike. In her report, annexed to the founding affidavit and marked "SPR7" she said that the voting did not proceed because the respondent denied them entry and that it was impossible to conduct the process outside the respondent's premises as it was rainy, misty and dark. The Commissioner did not state why a new date could not be fixed. At this point the court will point out that the conduct of the respondent is unacceptable. It is disappointing to learn that in 2009 there are still employers who are failing to co-operate with union and labour officials when conducting their duties at the workplace.

[6] Even though there was no voting, the employees nonetheless went on to engage in a strike action. On this point Mr. Gina argued that even though there was no voting, the strike is a protected strike in terms of Section 86(5) of the Act. That Section provides that;

"The Commission shall notify the result of a strike ballot to the parties within forty-eight hours of the holding of the ballot and failure by the Commission to organize a ballot in conformity with this section shall not deprive an otherwise lawful strike of the protection under this Act."

[7] On behalf of the respondent Mr. Mnisi argued to the contrary that the strike was not protected because there was no voting as required by the Act. The court was referred to the Industrial Court of Appeal case of **Nedbank Swaziland Limited v. Swaziland Union of Financial Institutions & Allied Workers Case No. 11/06** where it was held that it is a statutory requirement that a strike ballot be held

prior to the strike action to ensure that the decision to strike reflects the will of the employees concerned. This court is bound by this decision in terms of the principle of *stare decisis.*

[8] The evidence before the court also showed that the striking workers have since been dismissed by the respondent. Mr. Gina argued that the employees cannot be said to have been dismissed because such decision was not brought to each of them individually. It is not correct that the employees are not aware that they have since been dismissed by the respondent. In their own papers they have annexed document **"SPR 9"** in which the respondent states clearly that the striking workers have since been dismissed. Whether the dismissal was lawful or not is a question that the court cannot answer presently on the papers as they appear before the court.

[9] The 2 applicants having been dismissed by the respondent, they have a redress under the law if they are of the view that their dismissal was unlawful. They can report a dispute with CMAC, and if mediation fails, they can apply to the court for determination of the unresolved dispute. The 2nd applicants have not shown that they cannot be afforded substantial relief in due course if the matter is brought to court in the normal way.

See: Graham Rudolph v Mananga College (Judgement on points in limine) case No. 94/2007 (I.C.).

[10] The 2 applicants having been dismissed by the respondent, the court can only hear the matter after the provisions of Part VIII of the Act have been followed.

[11] Taking into account all the evidence before the court and all the circumstances of the case, the court will make an order that;

g) **The application is dismissed and the 2nd applicants are**

directed to first comply with provisions of Part VIII of the Act if they still want to pursue their matter.

h) No order as to costs is made.

The members agree.