IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE **CASE NO. 23/09**

In the matter between:

DUMISANI DLAMINI & 16 OTHERS **1ST Applicant**

SWAZILAND MANUFACTURING AND ALLIED WORKERS UNION **2nd Applicant**

and

SIYASPA (PTY) LTD TRADING (NHLANGANO SPAR) **Respondent**

CORAM:

P. R. DUNSEITH	**:**	**PRESIDENT**
JOSIAH YENDE	**:**	**MEMBER**
NICHOLAS MANANA	**:**	**MEMBER**
FOR APPLICANT	**:**	**A. FAKUDZE**
FOR RESPONDENT	**:**	**B. DLAMINI**

J U D G E M E N T – 30/1/2009

1. The Applicants have applied to the Industrial Court on notice of motion seeking an order in the following terms:

1.1 That all employees that participated in the revived strike action and currently locked out and/or prevented from

returning to their employment be called and allowed to return to work with immediate effect.

1.2 Declaring the resumed strike action that was engaged by the Applicants on from the 1st to the 4th August 2008 lawful.

1.3 That the 1st Applicant who are unlawfully locked out or prevented from returning to their employment are paid all their remunerations they would have been paid if they (1st Applicant) were not prevented from returning to working or locked out.

2. The application is brought under a certificate of urgency, and the Applicants ask the court to dispense with the normal forms and time limits provided for in the rules of court and to hear the application as a matter of urgency.

3. The application was served on the 23rd January 2009, and required the Respondent to file its answering affidavit not later than 9.30 a.m. on 26 January 2009 and to appear in court for the hearing on the 27th January 2009.

4. The Respondent duly appeared and raised the preliminary objection that the Applicant has not established sufficient grounds why the application should be heard as a matter of urgency.

5. Rule 15 (2) of the Industrial Court Rules, 2007 requires a party

applying for urgent relief to set forth explicitly in his founding affidavit –

5.1 the circumstances and reasons which render the matter urgent;

5.2 the reasons why the provisions of Part V111 of the Industrial Relations Act (providing for prior conciliation of the dispute) should be waived; and

5.3 the reasons why the Applicant cannot be afforded substantial relief at a hearing in due course.

6. The Applicants make the following averments in their founding affidavit with regard to urgency:

"6.1 The matter is urgent because the persistently locking out the 1*st* *Applicants and has demonstrated clearly to the Applicants that they (Respondents) will not allow the 1st Applicant to return to their employment.*

6.2 The Respondent has also begun a process of derecognizing the 2nd Applicant.

If the matter cannot be enrolled as an urgent application, the Applicants will not be afforded substantial redress in due course because by the time it is heard and determined, the Respondent would have long derecognized the Applicant. Therefore, if the Applicants were to follow the provisions of Part V111 of the Act, the urgency of the matter would be

undermined by the time it reaches the court as the Respondent has already issued notice to deregister the Applicant."

7. It is further alleged that the Applicants participated in a lawful strike on 1st August 2008. The Respondent and the Police interfered with the Applicants right to picket and an urgent application was launched for a restraining injunction on 4th August 2008.

8. The Respondent refused to allow the striking workers to return to work until the court application had been decided, contrary to the provisions of section 101 of the Industrial Relations Act.

9. The court delivered its judgement on 23 October 2008 and dismissed the application. When the workers reported for work they were again turned away by the Respondent.

10. The 2nd Applicant wrote to the Respondent on 2nd January 2009 demanding that the Respondent allows the workers to return to work. No response was received, and the present application was then instituted.

11. On the Applicant's version, the workers were unlawfully locked out as long ago as 5th August 2008, yet no action was taken. After the court judgement was delivered on the 23 October 2008 and the Respondent persisted in locking out the workers, still no action was taken until 2nd January 2009. No reason is given for the inaction on the part of the Applicants. There is nothing in their papers to suggest

that they were engaged in ongoing negotiations with the Respondent, or that they had engaged with the Labour Commissioner or CMAC to enforce the provisions of section 101 of the Act.

12. The only conclusion that can be drawn from the passivity of the union and its members is that they were not troubled by the lockout and did not find it urgent to challenge the conduct of the Respondent.

13. After finally bestirring itself on 2nd January 2009 to write a letter to the Respondent, the union lapsed again into its former lethargy until 23rd January 2009 when it instituted these proceedings by way of urgency.

14. Courts have repeatedly stated that a party who takes a lackadaisical attitude towards an infringement of its rights and neglects to act promptly in seeking relief cannot at a later stage suddenly engage a high gear and try to accelerate the litigation process by claiming urgency. This is what the present Applicants are trying to do, to the disadvantage and inconvenience of the Respondent and the court.

15. Since the Applicants have taken no action to challenge the alleged lockout since August 2008, they are clearly in no rush to return to work. The sudden urgency may well be prompted by the need to pay school fees in the new year. This is a self-created urgency.

16. In any event, there is no reason why the Applicants cannot obtain redress in due course. If they are successful in an application brought in accordance with the rules of court, they will receive the back pay to

which employees who have been illegally locked out are entitled.

17. Regarding the alleged threat of de-recognition, there is no merit in this ground. Firstly, there is no allegation that any of the locked out workers have been dismissed, so it is not clear why their lockout has any effect on the union's paid up membership. Secondly, de-recognition requires an application to court. The Applicants will have every opportunity to oppose such application and place their complaint of an illegal lock out before the court.

18. Finally, it is apparent that the Applicants have not reported their dispute to CMAC. If they had done so at the end of October 2008, the dispute may well have been resolved by now. The court will not permit Applicants to leapfrog over the dispute resolution procedures provided by the Act using a cynical claim to urgency.

19. The application is dismissed. We make no order as to costs.

The members agree.

PETER R. DUNSEITH
PRESIDENT OF THE INDUSTRIAL COURT