

IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 163/2009

In the matter between:

ATTORNEY GENERAL

Applicant

and

SITHEMBILE MHLANGA

1st Respondent

TISHO HADEBE DUMSILE

2nd Respondent

NXUMALO

3rd Respondent

CORAM:

S. NSIBANDE JOSIAH

PRESIDENT

YENDE NICHOLAS

MEMBER

MANANA

MEMBER

MR. N. S. HLOPHE MR. N.

FOR APPLICANT FOR

FAKUDZE

RESPONDENT

RULING ON POINTS IN LIMINE - 16TH JULY 2009

1. The Respondents are employed by the Swaziland Government as nurses and are currently living in Government houses at Mangweni Clinic in Northern Hhohho. The 1st and 2nd Respondents were transferred from Mangweni clinic in September 2008 to the Mankayane and Mbabane Government Hospitals respectively. The 3rd Respondent was also transferred from Mangweni Clinic to the Piggs Peak Government Hospital in September 2008.
13. The 1st and 2nd Respondents challenged their transfer by bringing an application to this court for the setting aside of their transfers because they considered them to be irregular. The 3rd Respondent did not challenge her

transfer. On the 17th February 2009, the Industrial Court dismissed 1st and 2nd Respondents' application and held that the transfers were lawful. Although 1st and 2nd Respondents appealed against the court's judgement, they did not seek that the judgement be stayed pending finalisation of the appeal process. Despite the court's judgement and the fact that the judgement was not stayed, the Respondents have failed and/or refused to vacate the Government houses they occupy at Mangweni clinic. They also have failed to report to the duty stations to which they have been transferred.

14. The Applicant has now applied to the Industrial Court on notice of motion supported by affidavit seeking an order in the following terms:

"1. *Dispensing with the normal forms of service and time limits provided for in the rules of this Honourable Court and to hear this matter as an urgent application.*

2. *Ordering that a Rule nisi issue calling upon Respondents to show cause if any, on a date to be determined by this Honourable Court why an order in the following terms should not be made final:*

15. *Ejecting the Respondents forthwith from the nurse's quarters at Mangweni Clinic, situated at Northern Hhohho, owned by the Swaziland Government.*

16. *That the rule nisi referred to above operate with immediate and interim effect pending the outcome of these proceedings.*

17. *Costs of Suit.*

18. *Further and/or alternative relief."*

19. The Application is brought under a certificate of urgency, and the Applicant asks the court to dispense with the normal forms, and time limits provided for in the rules of court and to hear this application as a matter of urgency.

20. The application was served on 27th March 2009 and required the Respondents to file their answering affidavits no later than 30th March 2009 and to appear in court for the hearing on 31st March 2009.

21. The Respondents duly appeared and raised three preliminary objections to the application in their answering affidavit. The objections raised were as follows:

6.1 That the matter was initially brought under Case No. 506/2008, a case in which the court had made a final decision and issued judgement. The case number was then later changed to the present case number. Respondents complain that the changing of the case numbers was irregular and state that the Applicant ought to have withdrawn the case under the old case number (506/2008) and tendered costs and then relaunched the eviction application afresh. The manner in which the case number was changed, it was submitted was irregular and the application ought to be dismissed for that reason.

22. That the 3rd Respondent was not a party to the application brought under Case No. 506/2008 and should have been joined thereto if case number 506/2008 was somehow continuing. Her inclusion under case number 506/2008 is irregular and the application ought to be dismissed.

23. That the matter is not urgent as the Applicant has not established sufficient ground for the application to be heard as an urgent one. That if there was any urgency to the matter then it was self-created since the Applicant had failed to arrange within its administration for the Respondents to leave the Mangweni Clinic and vacate the nurse's quarters.

24. With regard to the issue of the case number, the Applicant explained that when it brought this application for registration, the Registrar's office allocated the old case number (506/08) to the matter, when it ought to have been allocated a new case number since it was a fresh matter. The issue was, however rectified at the earliest possible moment once the Applicant's representatives had brought the mistake to the attention of the Registrar.

25. The Respondents are correct that procedurally this application ought not to have been registered as case 506/2008 which matter was finalised. Once that had happened the Applicant ought to have withdrawn the application, tendered costs and filed the application anew as a fresh application. However, in terms of section 11 (1) of the Industrial Relations Act 2000 as amended this 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 and is not likely to result in a miscarriage of justice.*"

The Respondents suffered minimum, if any, prejudice by the changing of the case numbers and were able to file their opposing papers with minimum inconvenience. It is our view that the procedural defect complained of has not resulted in the miscarriage of justice and this preliminary objection is dismissed.

26. The point regarding the joinder of the 3rd Respondent suffers the same fate as it is inextricably tied to the previous point.

27. With regard to the issue of urgency, the Applicant states the following in its founding affidavit:

28. *The Respondents from even before their transfers to date are no longer performing their duties. In fact on the 12th of December 2007 they engaged on an illegal strike. This has placed the lives of innocent patients at stake as they no longer received full and appropriate medical attention such as ARV pills.*

29. *Respondents continued occupation of the nurses' quarters*

extremely frustrates and in fact renders it impossible for the Ministry of Health to accommodate new nurses that have been transferred to replace the Respondents.

30. *I aver that irreversible harm or loss of life either through lack of medication or violence from the aggrieved public will occur at Mangweni clinic if the Respondents are not ejected from the quarters as such ejection will enable the replacement nurse to take up immediate occupation of the flat and thereafter forthwith provide full services to the general public.*

31. *I am advised and verily believe that I cannot obtain adequate relief in due course as the situation at Mangweni clinic is volatile and threatens to turn violent at any time, thus endangering life and property.*

On the Applicant's own version the issue with Respondents started with an illegal strike in December 2007, yet no action was taken. After the court's judgement of 17th February 2009, and after the Respondents failed and/or refused to vacate the nurse's quarters and to report to their new work stations to which they had been transferred, still no action was taken until this application was launched at the end of March 2009. No explanation for the inaction is given and there is nothing in the Applicant's papers to suggest that they were engaged in some administrative process to ensure the Respondents were moved from Mangweni Clinic. It is significant that even the conduct of the 3rd Respondent who, it is alleged, did not challenge her September 2008 transfer was not challenged by the Applicant. She has been allowed to remain in residence since September 2008 since she was transferred.

The only conclusion that can be drawn from the passivity of the Applicant is that it was not troubled by the failure and/or refusal of the Respondents to vacate their living quarters.

32. 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 Applicant is trying to do, to the disadvantage inconvenience of

the Respondents and the court. It is our view that the sudden urgency claimed is a self created one.

33. In any event, there is no reason why the Applicant cannot obtain redress in due course. If they are successful in an application brought in accordance with the rules of court, the Respondents will be evicted. The Applicant can also institute disciplinary proceedings against the Respondents as there is no reason why they are not reporting to their new work stations following that their transfers were not set aside.
34. The application is dismissed. We make no order as to costs.