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IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE **CASE NO. 223/09**

In the matter between:

DUMSANI DLAMINI	**APPLICANT**
SIPHO MAMBA SIFISO	**APPLICANT**
MAMBA NQAMANE	**APPLICANT**
VILANE JUSTICE	**4th APPLICANT**
MAKHANYA WANDILE	**5th APPLICANT**
NSIBANDZE BONGANI	**6th APPLICANT**
NSIBANDZE SIFISO	**APPLICANT**
MAVUKA SIBUSISO	**8th APPLICANT**
DLAMINI SIBUSISO	**9th APPLICANT**
MAMBA SABELO	**10th APPLICANT**
MOFOKENG	**11th APPLICANT**
SABATHA NHLABATSI	**12th APPLICANT**
THABO MABUZA	**13th APPLICANT**
GUGU ZWANE	**14th APPLICANT**
SIBUSISO MAGAGULA	**15th APPLICANT**

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and
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SIYASPA (PTY) LTD TRADING AS NHLANGANO SPAR) **RESPONDENT**

CORAM:

S. NSIBANDE	**PRESIDENT**
JOSIAH YENDE	**MEMBER**
NICHOLAS MANANA	**MEMBER**
	FOR APPLICANT
MR. FAKUDZE MR.	**FOR**
B. S. DLAMINI	**RESPONDENT**

RULING ON POINTS OF LAW - 22/09/09

1. The Applicants have applied to court on notice of motion for an order in the following terms:

8. *Declaring the strike action that was engaged by the Applicants from 24th December 2007 to the 3rd January 2008 lawful.*

9. *Declaring the strike action that was resumed by the Applicants on the 1st August 2008 lawful.*

10. *That all employees currently locked out or prevented from returning to their employment be called and allowed to return to their employment with immediate effect.*

11. *That the employees (Applicants) who are unlawfully prevented from returning to their employment or locked out are paid all their remunerations they would have been paid if they (Applicants) were not locked out or prevented from returning to their employment*

12. *Ordering the Respondent to pay the costs of this application.*

13. *Further and/or alternative relief.*

2. A full set of affidavits was filed. The Respondent in its answering affidavit raised the following points in limine:

14. *That the order sought by the Applicants was not competent because they were dismissed for engaging in an unlawful strike action in August 2008.*

15. *That the above Honourable Court declared the strike action of August 2008 unlawful in the premises Applicants ought to have appealed or sought a review of that judgement instead of bringing another application to declare the said strike legal.*

3. The Respondent asserts that on 4th August 2008 a letter was directed to the Applicants" representative, The Swaziland Manufacturing and Allied Workers Union, advising it of the decision to terminate the services of all the employees participating in what it termed the unprotected industrial action. This letter was dated 4th August 2008 and the Respondent purported to be acting in terms of section 88 (6) of
the Industrial Relations Act 2000 as amended. Section 88 (6) reads:

"The employer may, where an employee takes part in a strike action which is not in conformity with this part, treat such an action as a breach of contract and may terminate the employee's services summarily."

4. Applicant's representative complained that the letter referred to as an annexure to the Respondent's papers was not annexed and that he had heard, for the first time, during conciliation that the Respondent's position was that the Applicants had all been dismissed for engaging in an unlawful strike. Applicants submitted that the only reason the Respondent raised the defence that the Applicants have been dismissed was because the Conciliation Mediation and Arbitration Commission had made it clear that it was unlawful to lock out an employee who presents himself to work after a lawful strike.

CORAM:

16. Despite having knowledge of the Respondent's allegation that they were dismissed, the Applicant did not take issue with this allegation in their founding papers. When their dispute with the Respondent came before the Commissioner at CMAC sometime after the 25th February 2009, at that time at least they became aware that the Respondent's position was that they had been dismissed for participating in an unprotected on illegal strike action. By the time they launched the application on 25th May 2009, the Applicants either knew or ought to have foreseen that the Respondent would raise the defence that they had been dismissed but chose not to even touch on that issue. These are material facts that ought to have been raised if the Applicants are arguing that they remain employees of the Respondent. No reason is set forth why they failed to do so.

17. It is trite that once the employer terminates the services of an employee the court's powers and jurisdiction thereafter is to award compensation for unfair dismissal, whether the unfairness is substantial or procedural, or to restore the employment contract by making an order for reinstatement or re-engagement.

Gcina Dlamini v Nercha, Sikhumbuzo Simelane N.O. IC Case No. 633/08.

7. The Applicants do not dispute that they have been dismissed by the Respondent. They simply say they only came to know of the dismissal at conciliation. In the premises whether they agree or disagree with the substantive or procedural aspects of their dismissal, their remedy now is to report a dispute in terms of the Industrial Relations Act 2000 (as amended) and their matter will eventually come either before the court or an arbitrator (if the dispute remains unresolved) where in the full circumstances of their dismissal, including any alleged procedural irregularities, will be fully explored by way of oral evidence at a trial.

18. For the above reasons we uphold the Respondent's preliminary point of law. It is not necessary to decide on the second point save to comment that it does appear that the Applicants having failed to establish the lawfulness of their strike in Case 344/08 are seeking a second bite at the matter which appears to be irregular.

19. On the issue of costs, we consider it fair to grant the Respondent's costs herein for the reason that when the application was launched, the Applicants were well aware that the Respondent's position was that their services had been terminated.

The application is dismissed with costs.

S. NSIBANDE

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