



IN THE INDUSTRIAL COURT OF SWAZILAND

R U L I N G

Case NO. 258/12

In the matter between:

**THE SWAZILAND NATIONAL
ASSOCIATION OF TEACHERS**

Applicant

And

SWAZILAND GOVERNMENT

1st Respondent

ATTORNEY GENERAL

2nd Respondent

Neutral citation: *The Swaziland National Association of Teachers v Swaziland Government & Another (258/12) [2012] SZIC 27 (AUGUST 3 2012)*

Coram: NKONYANE J,
*(Sitting with G. Ndzinisa & S. Mvubu
Nominated Members of the Court)*

Heard : 2ND AUGUST 2012

Judgment delivered: 3RD AUGUST 2012

Summary:

Protected strike action—it is unlawful for an employer to initiate disciplinary proceedings against an employee for participating in lawful or protected strike action---A strike action that is in terms of the provisions of the Industrial Relations Act is *prima facie* lawful and protected until declared otherwise by the Court.

**RULING ON POINT OF LAW RAISED
03.08.12**

[1] This is an urgent application brought by the Applicant against the Respondents for an order in the following terms:

- “1. Waiving the usual requirements of the Rules of Court regarding form, notice and service of the application and permitting that this matter be heard as one of urgency.

2. That a *rule nisi*, returnable on a date to be determined by the above Honourable Court, do hereby issue, calling upon the Respondents to show cause why an order in the following terms should not be made final.

2.1 Restraining and interdicting the Respondents from dismissing Applicant's members for participating in a lawful and protected strike action that commenced on the 25th July 2012.

2.2 Pending final determination of the matter before the above Honourable Court, prayer 2.1 above operate with immediate interim effect.

3. Costs of suit on the scale of attorney and own client.

4. Further and or alternative relief."

[2] The Respondents' representatives were served with the Notice of Application on 31st July 2012 at 13:07 hours. The Respondents have filed an Answering Affidavit which was served on the Applicant's attorneys on 01st August 2012. The Applicant prepared a Replying Affidavit which was served on the Respondents' Counsel on 02nd August 2012. The Replying Affidavit and Heads of Argument by the Applicant were filed in court from the bar. The parties informed the court that they were ready to proceed to argument.

[3] In their Answering Affidavit, deposed thereto by Mduzuzi Elliot Nkambule, the Respondents raised a point of law and did not plead over the merits of the application. Presently therefore, the evidence of the Applicant as contained in the Founding Affidavit remains undisputed.

[4] The Respondents in their Answering Affidavit applied to the Court however, that “*in the unlikely event the point of law is not upheld the Respondents pray that they be allowed to plead to the merits of the matter.*”

[5] The point *in limine* raised by the Respondents is that the present application is misplaced. It was argued that the application is misplaced because the Applicant is seeking an order restraining and interdicting the Respondents from dismissing the Applicant’s members for participating in an alleged lawful and protected strike action that commenced on 25th July 2012, when in fact the Respondents were not dismissing the Applicant’s members based on the alleged lawful and protected strike that commenced on 25th July 2012.

[6] It was argued further on behalf of the Respondents that:

- 6.1 The Applicant's members were not being dismissed for the strike that commenced on 25th July 2012.
- 6.2 The Teaching Service Commission (TSC) or Government has not taken a position with regards to the strike action that commenced on 25th July 2012 whether to dismiss the teacher or not.
- 6.3 The Teaching Service Commission intends to take disciplinary measures only against those teachers who participated in strike actions that were declared unlawful by the Industrial Court.
- 6.4 The Teaching Service Commission and/or Government is well aware that a strike action has to have a pronouncement of this Honourable Court whether or not it is unlawful. The employer cannot therefore dismiss and/or discipline teachers for the strike that commenced on 25th July 2012, and there is presently no intention to do so. The employer reserves the right to commence disciplinary action only after a pronouncement by the court that the strike is unlawful.

- 6.5 The warning that the employer issued, in terms of “**Annexure J**” of the Founding Affidavit, relates to the strike actions that were declared unlawful by this court.
- 6.6 There is only one member of the Applicant that has been mentioned in terms of “**Annexure A**” of the Replying Affidavit. The other members of the Applicant are unknown.
- 6.7 The averments cannot sustain a prayer for interdict. The right to be protected must relate to the relief being sought. In the present case only one person by the name of Fikile C. Dlamini is mentioned in the “**Annexure A**” of the Replying Affidavit.
- 6.8 The injury must be proven and the persons affected must be identifiable.
- 6.9 The present application is not properly before the court as it relates to a period that is not relevant.

[7] On behalf of the Applicant it was argued that:

7.1 The Respondents chose not to plead over to the merits of the case. They can therefore only file further papers with the leave of the court.

7.2 It is not in dispute that the Industrial Court issued orders interdicting previous strike actions carried out by the Applicant's members. The question that remains to be answered is whether the members continued to go on strike even after the court orders. That matter is still pending before this court.

7.3 The Applicant started the strike process afresh after the court orders interdicting the previous strike actions. The strike action that commenced on 25th July 2012 is therefore lawful until the Industrial Court rules to the contrary.

7.4 The Respondents have not yet approached the Industrial Court for an order declaring the strike that commenced on 25th July 2012 unlawful.

[8] **Analysis of the Arguments and the Law Applicable:-**

The Applicant is presently seeking a temporary interdict. An interdict is an order made by a court prohibiting or compelling the doing of a particular act for the purposes of protecting a legally enforceable right which is threatened by continuing or anticipated harm.

(See: **Herbstein and Van Winsen: The Civil Practice of The Supreme Court of South Africa 4th edition p. 1063**)

[9] The harm sought to be prevented therefore must either be unlawful taking place or anticipated by the Applicant.

[10] Both parties rely largely on “**Annexure A**” of the Applicant’s Replying Affidavit for their arguments before the court. Mr. Khumalo argued that the court must not make any order but must dismiss the application because the Applicant is specific that it is complaining about the strike that commenced on 25th July 2012, whereas in “**Annexure “A”**” it is clear that the employer is taking disciplinary action against its employees for

disobeying Court Order and engaging in an illegal and unprotected strike action which started from 20th June 2012 and 06th July 2012.

[11] On behalf of the Applicant it was argued that it was clear from “**Annexure A**” that the employer is currently also dismissing teachers that participated in the lawful strike action that commenced on 25th July 2012.

[12] It is important at this point to reproduce in full the contents of “**Annexure A**”. It appears as follows:-

31/07/2012

Fikile C. Dlamini
Masundwini Primary School
Box
Manzini.

Dear Sir/Madam,

DECISION OF THE TEACHING SERVICE COMMISSION

Following your act of disobeying Court Orders and of engaging in an illegal and unprotected strike action which started from the 20th June, 2012, and 6th July 2012, and your failure to heed the clear ultimatum issued by your employer; be advised that your employment with the Teaching Service Commission is hereby terminated with effect from 31st July, 2012 in terms of **Section 88 (6) of the Industrial Relations Act, 2000** as amended.

You are hereby directed to hand over all school property and official books in your possession to the Head Teacher/Regional Education Officer or Regional Education Officer’s representative.

Should you be occupying a Government House/Community House/Mission House, you are to vacate premises within seven working days.

**M.E. NKAMBULE
EXECUTIVE SECRETARY”**

[13] There is no doubt that the employer in this letter was referring to specific dates being 20th June 2012 and 06th July 2012. The employer did not specifically mention the strike action that commenced on 25th July 2012. If this was all that this letter contained, the Respondents’ argument would clearly carry the day and the point *in limine* would be upheld.

[14] The letter however continues to state that this teacher is also being terminated for the reason that she failed to heed the clear ultimatum issued by the employer.

[15] The ultimatum issued by the employer is contained in “**Annexure J**” of the Applicant’s Founding Affidavit. The ultimatum was issued on 25th July 2012, which was also the commencement date of the current strike action. The ultimatum first addresses the two strike actions that were declared unlawful by the Industrial Court. In paragraphs 2 and 3 it is stated that;

“2 The Teaching Service Commission orders all teachers who are not at work to return to work and execute their lawful duties on or before Monday 30th July, 2012.

3. Any teacher who fails to heed the above warning of returning to work on the 30th July, 2012, the Commission shall treat such failure as a breach of contract of employment and shall forthwith terminate the employment of such a teacher. The termination shall be done in accordance with section 88 of the Industrial Relations Act of 2000 as amended; section 36 of the Employment Act of 1980 and Regulation 15 as read with Regulation 17 of the Teaching Service Regulations of 1983.”

[16] **Annexure J** is the only ultimatum or final warning that was issued by the employer, the Teaching Service Commission, that is presently before the court. The apprehension by the Applicant’s members is therefore reasonable if the employer is also dismissing the teachers for failure to heed the ultimatum which was issued by the employer on 25th July 2012, when

there is currently no order of the Court declaring the strike action that commenced on 25th July 2012 as being unlawful.

[17] In terms of the laws of this country an employee is not acting unlawfully if he/she participates in a lawful or protected strike action. Any employer, whether it be the Government or a private employer, who initiates disciplinary action against, and dismisses an employee for taking part in a lawful strike action is clearly acting in contravention of the laws of this country. Such conduct amounts to automatically unfair dismissal.

[18] Automatically unfair dismissal means a dismissal where the reason for the dismissal is:

“(a) that the employee participated in or supported or indicated an intention to participate in or support, a strike or protest action that complies with the provisions of Part VIII.”

(See: Section 2 of the Industrial Relations Act, 2000 as amended)

[19] The court therefore comes to the conclusion that the requirements of a temporary interdict have been satisfied by the Applicant. The Applicant's members have a right to a fair pre-dismissal procedure. From the evidence before the court the Applicant's members have also established that they have a well grounded apprehension of irreparable harm, and that they have no other remedy except to approach this court on an urgent basis it being the only court with exclusive original jurisdiction in labour related disputes.

[20] It was argued on behalf of the Respondents that the court should not issue the interim relief sought because the affected members of the Applicants have not been specified in the application. The Industrial Court is not 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.

(See: **Section 11 of the Industrial Relations Act, 2000
as amended**).

- [21] No miscarriage of justice is likely to result if the court grants the interim order sought in prayer 2.1 even when the affected members of the Applicant have not been mentioned individually. In any event, those members of the Applicant that are being dismissed or are to be dismissed are known to the Teaching Service Commission as the employer. It is unlikely that an employer would dismiss an employee that it does not know.
- [22] The court was also entreated not to take into consideration “**Annexure K**” of the Founding Affidavit, being a copy of a newspaper headline, on basis that it constitutes hearsay evidence. As a general rule, hearsay evidence is not permitted in affidavits. There are however exceptions to this general rule in cases of urgent applications where threatened injury or invasion of rights can be shown. In the Industrial Court the exception is also provided for under section 11 of the Industrial Relations Act, 2000, already referred to in paragraph 20 above.
- [23] Taking into account all the foregoing observations, the arguments presented in Court, and also all the circumstances of this case, the point of law is dismissed and court will make an interim order in terms of prayer 2.1 of the Notice of Application. The return date will be agreed upon in Court between the parties.

[24] The members are in agreement.

N. NKONYANE J
JUDGE OF THE INDUSTRIAL COURT

FOR APPLICANT : MR. M. MKHWANAZI
(MKHWANAZI ATTORNEYS)

FOR RESPONDENTS : MR. S. KHUMALO AND MR. T. VILAKATI
(ATTORNEY GENERAL'S CHAMBERS)

[27]

[28]

[29] The members agree.

N. NKONYANE J

For Applicant :

For 1st Respondents :