



IN THE INDUSTRIAL COURT OF SWAZILAND

JUDGMENT

Case NO. 456/14

In the matter between:

SWAZILAND RAILWAY

Applicant

and

**PUBLIC AND PRIVATE SECTOR
TRANSPORT WORKS UNION**

Respondent

Neutral citation: *Swaziland Railway v Public & Private Sector
Transport Workers Union (456/14) SZIC 44
(OCTOBER 08 2014)*

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

Heard: **12 SEPTEMBER 2014**

Delivered: **08 OCTOBER 2014**

Summary :

The Respondent union issued a strike notice to the Applicant. The Applicant launched an urgent application to interdict the Respondent from commencing with the strike action arguing that the dispute between the parties was a dispute

of right and not of interest, and that the Respondent was not therefore legally entitled to engage in industrial action.

Held---The dispute between the parties was a dispute of interest and the Respondent was legally entitled to engage in a strike action.

Held further---Disputes of right concern the application or interpretation of existing rights embodied in a contract of employment, collective agreement or statute, while disputes of interest concern the creation of fresh rights, such as higher wages, modification of existing collective agreements.

JUDGMENT 08.10.14

1. The Applicant in these proceedings is Swaziland Railway, a statutory public enterprise body established in terms of the Railway Act of 1962. It has its Head Office in Mbabane along Dzeliwe Street in the Hhohho District.
2. The Respondent is the Public and Private Sector Transport Workers Union, a trade union duly established in accordance with the labour laws of the kingdom of Swaziland, and is duly recognized by the Applicant as the collective bargaining agent for all unionsable employees at the Applicant's undertaking.

3. The Applicant instituted the present proceedings under a certificate of urgency and is seeking an order in the following terms;

- “1. *Dispensing with the requirements of the rules of court with relation to service of process and timelines, and permitting this matter to be heard as one of urgency.*
2. *That the applicant’s none compliance with the rules relating to the above said forms and service be condoned.*
3. *That a rule nisi do hereby issue calling upon the respondent to show cause on a day to be appointed by the above Honourable Court why the following orders should not be made final:*
 - 3.1 *That the respondent be and is hereby interdicted from continuing with the strike action intended to commence on 17th September 2014.*
 - 3.2 *That the respondent called upon to take all appropriate and necessary action to prevent its members from participating in the intended strike action set to commence on 17th September 2014.*
 - 3.3 *That the respondent be called upon to call the intended strike action.*
4. *That the orders above are to operate with immediate and interim effect pending the finalization of the matter.*
5. *Cost of suit on the scale as between attorney and own client.*
6. *Further and/or alternative relief”.*

4. The Applicant's application was opposed by the Respondent, and an answering affidavit was duly filed deposed thereto by Thandukwazi Dlodlu, the Secretary General.
5. The Applicant did not file a replying affidavit to the Respondent's answering affidavit.
6. When the matter first appeared before the court on 11th September 2014, an interim order in terms of prayer 3.1 was granted. The court heard arguments on the merits on 12th September 2014.
7. The facts of the application revealed that during the financial year 2011/2012 the Applicant was experiencing some financial difficulties. A decision was therefore taken by the **Standing Committee on Public Enterprises (SCOPE)** that all public enterprises were not going to grant any salary increments to their employees. The Applicant is a category A public enterprise in terms of the **Public Enterprises (Control and Monitoring) Act N0.8 of 1989** as amended.
8. During the financial year 2012/2013 things had improved gradually. During the wage negotiations in the 2012/2013 financial year, the Respondent tabled a demand that its members be paid a once off 5% lump sum payment to compensate the fact that there was no salary increment the previous year.

- 9.** The evidence revealed that indeed SCOPE had approved a once off 5% lump payment for all public enterprises for the financial year 2012/2013. When the Applicant wanted to effect the directive from SCOPE and effect payment to the Respondent's members however, SCOPE refused that the Applicant could proceed with the payments. The basis of this disapproval was that during the financial year 2010/2011, when the financial situation was dire, the Applicant had effected an increment for the Respondent's members.
- 10.** A dispute ensued thereafter, the Respondent's members demanding to be paid the once off 5% lump sum payment that was paid to all employees of public enterprises for the 2012/2013 financial year. The Respondent reported the dispute to the Conciliation, Mediation and Arbitration Commission (CMAC). The dispute could not be resolved and a certificate of unresolved dispute was issued by the Commission on 11th November 2013.
- 11.** The Applicant argued before the court that:

 - 11.1** The dispute between the parties pursuant to which a certificate of unresolved dispute was issued by CMAC is a dispute of right and not of interest, and the Respondent is supposed to approach the court to enforce its members' rights and not to engage in industrial action.
 - 11.2** The Respondent's members' right to engage in industrial action has become stale as the Respondent's members have delayed in

taking any further action since the certificate of unresolved disputes was issued on 11th November 2013.

11.3 The notice for the intended strike action served on the Applicant on 05th September 2014 is defective in that it does not stipulate the exact time on which the strike action will commence.

12. Nature of the Dispute: Dispute of Right or Interest.

As already pointed out herein, the Applicant's argument is that the present dispute between the parties is a dispute of right and therefore justiciable. It was argued on behalf of the Applicant that the Respondent's member have no right to engage in industrial action and that they should simply approach the court to enforce their right to be paid the 5% once off lump sum payment.

13. The question that the court must answer therefore is, what is a dispute of right. The starting point is the **Code of Good Conduct**. Paragraphs 3.3.1 and 3.3.2 provides the following;

“3.3.1 “A dispute of right may be described as a dispute arising from the breach or contravention of law, contract of employment or collective agreement.

3.3.2 “A dispute of interest on the other hand cannot be resolved through enforcing legal rights. The parties are, through negotiation, attempting to create a right by agreement with the other party”

In the present case, there was no collective agreement signed between the parties in terms of which the Applicant who is the employer of the Respondent's members, agreed to pay the Respondent's members the once off 5% lump sum payment. Since there was no collective agreement signed by the parties, no right vested on the Respondent's members to be paid the said amounts.

14.In the case of **Swaziland Railway Staff Association v Swaziland Railway, Case No. 345/2012** this Court made the following statement in paragraph 13;

“...Once the parties reach an agreement, the law says that agreement must be reduced into writing signed by the parties and submitted to the court for registration. The agreement becomes part of the terms and conditions of employment. In terms of section 57 (1) once registered, the agreement “shall be binding on the parties” that is the document that any of the parties can come to court to enforce. There was no such document presented in court...”

Similarly, in the present case, there was no evidence of any collective agreement or any other instrument issued by the Applicant to the Respondent, to the effect that the Respondent's members are entitled to be paid the once off 5% lump sum payment. There is no contract of employment between the Respondent's members and SCOPE. From the evidence before the court, SCOPE issued the directive or circular to the public enterprises, including the Applicant.

15.Section 85 (2) of the Industrial Relations Act No.1 of 2000 as amended provides that;

“If an unresolved dispute concerns the application to any employee of existing terms and conditions of employment or the denial of any right applicable to any employee in respect of his dismissal, employment, reinstatement, or re-engagement, either part to such dispute may refer the dispute to the court for determination or if the parties agree to refer the dispute to arbitration.”

Presently, there is no provision in the terms and conditions of employment of the Respondent’s members that they shall be paid a once off 5% lump sum payment. The present dispute cannot therefore be referred to the court for determination.

16.Section 2 of the Industrial Relations Act provides the following definition of dispute;

“ dispute” includes a grievance and means any dispute over-

a) The entitlement of any person or group of persons to any benefit under an existing collective agreement, or works council agreement.”

In the present case there was no evidence that there is an existing collective agreement which contains a provision that the Respondent's members are entitled to be paid the once off 5% lump sum payment.

17. The question whether a particular dispute is a dispute of right or of interest did come before this court in the case of **Royal Swaziland Sugar Corporation v Swaziland Agricultural and Allied Staff Association, case no. 500/2007 (IC)**. The court stated in that case that if a party does not have a legal entitlement to something, then that dispute constitutes a dispute of interest. In the present case, the payment of the 5% lump sum payment is not a legal entitlement to the Respondent's members because there was no instrument issued by the employer (Applicant) to the Respondent's members entitling them to the payment of the said amount, nor is there a collective agreement signed by the parties in terms of which they agreed that the Respondent's members would be paid the once off 5% lump sum payment.

18. In the case of **SA Yster Steel v ISCOR Limited (1991) 12 ILJ 1038** the Court pointed out that;

“In some legal systems, a clear distinction is made between disputes of right and disputes of interest. Disputes of right concern the application or interpretation of existing rights embodied in a contract of employment, collective agreement or statute, while dispute of interest concern the creation of fresh

rights such as higher wages, modifications of existing collective agreements etc ... Collective bargaining, mediation, arbitration are generally regarded as appropriate avenues for the settlement of conflicts of interest, whilst adjudicating is normally seen as appropriate for the resolution of disputes of rights”.

In the present case there is nothing in the contracts of employment of the Respondent’s members entitling them to the payment of the said once off 5% lump sum payment. There is also no evidence before the court that the parties signed a collective agreement wherein the employer (the Applicant) agreed to pay the said amount to the Respondent’s members. Taking into account all the above observations, the court comes to the conclusion that the present dispute between the parties is a dispute of interest.

19.HAS THE RIGHT TO STRIKE BECOME STALE:

It was argued on behalf of the Applicant that the Respondent having issued the strike notice on 05th September 2014, some ten months after the certificate of unresolved dispute was issued, the right to strike has become stale.

20.There is no time limit specified in the Industrial Relations Act within which a strike action must take place. The Act only provides for the period within which a dispute may be reported to CMAC. The period

in terms of section 76 (2) of the Act is eighteen months. The period of eighteen months should therefore be the guide to the court in determining the question whether or not the right to strike has become stale .

21. In the present application there was a delay of about ten months. Can, in the circumstances of this case, be concluded that the Respondent had let go of its right to strike. In the case of **NEHAWU v University of Cape Town 2003 (2) BCLR 154** the court made the following remarks at paragraph 31;

“By their very nature labour disputes must be resolved expeditiously and be brought to finality so that the parties can organize their affairs accordingly.”

In the present application the Respondent did explain what caused the delay in its answering affidavit. It stated that there was an election process and that thereafter, the Applicant refused to recognize the new members for more than three months. This evidence was not disputed by the Applicant as it did not file a replying affidavit.

22. In the case of **Public Servants Association of S.A. v Minister of Justice and Constitutional Development and Others (2001) 22 ILJ 2303 (LC)** the state attorneys employed by the Department of Justice waited for six months before deciding to engage on a strike action. The court found that Applicant had not waived its right to strike. In

the case of **Vermeulen’s Executrix v Moolman 1911 AD 384** Innes JA stated the following at paper 409;

“And the well-known principle applies that an intention to waive rights of any kind is never presumed. There must therefore be clear evidence not only of the owner’s knowledge, but of his inaction for a sufficient time and under effective circumstances”

The explanation by the Respondent having not been disputed by the Applicant, there is no reason why the court should not accept it as being a reasonable explanation. The best approach in such an application is to adopt the well-known principle that each case must be determined in terms of its own peculiar facts and circumstances. In the present case, taking into account all the circumstances of the case and also the undisputed explanation by the Respondent it cannot be said that the right to strike had become stale or that the Respondent waived or abandoned its right to strike.

23.DEFECTIVE STRIKE NOTICE

It was also argued on behalf of the Applicant that the intended strike action should be interdicted because the notice to engage in a strike was defective as it did not inter alia, state the exact time on which it was going to commence. This submission will be dismissed by the court as this was not a final strike notice. There was no evidence before the court that the Respondent was not going to be specific as to the time when the strike action will commence when it issued the

second strike notice. In terms of section 86 (8) the Respondent is supposed to give the Applicant forty eight hours' notice. Forty eight hours is a specific and determinable period which will leave the Applicant in no doubt as to the time that the strike action would commence.

24. There is no legal requirement that the union should reveal its strategies and tactics to the employer. It is inherent in the nature of a strike that it is a power-play. It is this uncertainty about the strategies, tactics and duration of the strike which adds to the effectiveness of the strike and the goal of collective organizing. The submission is accordingly dismissed.

25. Taking into account all the evidence before the court, the submissions by both counsel, the circumstances of the case, the court will make the following order;

- a) The Rule nisi is discharged.
- b) The Applicant's application is dismissed.
- c) The Applicant is to pay the costs of suit based on the ordinary scale.

The members agree.

N NKONYANE
JUDGE OF THE INDUSTRIAL COURT OF SWAZILAND

For Applicant : Mr Z.D. Jele
(Robinson Bertrams)

For Respondent : Mr. S.L. Madzinane
(Madzinane Attorneys)