



**IN THE INDUSTRIAL COURT OF SWAZILAND**

**HELD AT MBABANE**

**CASE NO. 433/2017**

In the matter between:

**DR. ZABENGUNI MKHATSHWA  
AND OTHERS**

**APPLICANT**

and

**SWAZILAND GOVERNMENT**

**1ST RESPONDENT**

**ATTORNEY GENERAL**

**2<sup>ND</sup> RESPONDENT**

Neutral citation: Dr. Zabenguni Mkhathshwa and Others v Swaziland  
Government and Attorney General (433/2017) [2018]  
SZIC 10 (2018)

**Coram** : Nsibande J.P.  
(Sitting with N.R. Manana and M.P. Dlamini  
Nominated Members of the Court)

Heard : 06 February 2018

Delivered : 14 February 2018

---

## RULING ON POINTS IN LIMINE – 13/02/18

---

1. The Applicants have applied to the Court for an order:
  - 1.1 *Dispensing with the normal requirements set out in the Rules of the above Honourable Court relating to service of documents and time limits and that the matter be heard as one of urgency.*
  - 1.2 *That a Rule Nisi do hereby issue, calling upon the Respondents to show cause why an order in the following terms should not be made final:*
    - 1.2.1 *Reviewing and setting aside Circular No. 1 of 2018 and declared (sic) null and void ab initio.*
    - 1.2.2 *Consolidating this application with Case No. 36/2018 for purposes of argument hereof.*
  - 1.3 *Restraining and interdicting the 1<sup>st</sup> Respondent from implementing the said Circular pending finalization of this application and determination of the matter by the Labour Commissioner in terms of Section 26 of the Employment Act 1980.*
  - 1.4 *Costs of the Application.*
  - 1.5 *Further and/or alternative relief.*

2. The application is opposed and the Respondents have raised the following points *in limine*:

2.1 Locus Standi – The Respondents complain that the Applicant, Dr. Zabenguni Mkhathshwa has not alleged the necessary authority to institute the proceedings on behalf of all the other Applicants and that the foundation of her authority has not been laid in the founding affidavit nor have the further Applicants confirmed this authority by filing confirmatory affidavits. They complain that the further Applicants are unknown to them following that no schedule of Applicants has been annexed to the Applicant’s papers. In response to the challenge, the Applicant directed the Court to paragraphs 2 and 3 of the Founding Affidavit as well as the Respondents’ answering affidavit. Paragraph 2 of the founding affidavit reads:

***“I have the authority of all the Applicants herein to depose on their behalf to this Founding Affidavit and to institute the present Application”.***

***Paragraph 3 reads: “All the Applicants herein are employed by the 1<sup>st</sup> Respondent as Professionals and Technical Hospital Staff and are stationed in all Hospitals and Clinics in all the four regions of the Kingdom of Swaziland”.***

In response, Applicants submitted that the contents of these paragraphs had not been denied by the Respondents in

Answering Affidavit and that in the absence of a denial such contents are taken to have been admitted. It was also submitted that in any event a normal reading of paragraphs 2 and 3 of the Founding Affidavit adequately describe the Applicants and advises the Respondents who the Applicants are.

A proper reading of paragraphs 2 and 3 of the Founding Affidavit does not indicate who the other Applicants are. While it is correct that Dr. Zabenguni Mkhathshwa professes to have the authority to depose to the Founding Affidavit and to institute the present application on behalf of all the Applicants, paragraph 3 does not describe the Applicants. It simply states that all the Applicants are employed by the 1<sup>st</sup> Respondent as Professionals and Technical Hospital Staff and indicates where they are stationed. It may well be that all the Applicants are employed by the 1<sup>st</sup> Respondent as Professionals and Technical Hospital Staff, but it does not follow that ALL the Professionals & Technical Hospital Staff are Applicants herein. If they are, that is not what has been attested to by Dr. Mkhathshwa.

Be that as it may, the point raised does not affect the application fatally. As far as Dr. Mkhathshwa is concerned, the application remains good as she has the requisite locus standi to bring same in her name and on her own behalf. With regard to the other Applicants it will be necessary that a supplementary affidavit be filed with a list of all those Professionals and Hospital Technical Staff who are

Applicants herein and an indication of what interest they have in the matter.

2.2 The dispute concerning Establishment Circular No.1 of 2018 pending before the Labour Commissioner. Respondents submitted that the Applicants were prematurely before this Court regard being had to the fact that they had asked the Labour Commissioner for his opinion in terms of Section 26 of the Employment Act No.5 of 1980 and that matter was still pending before the Labour Commissioner. It is not in dispute that the Applicants have asked the Labour Commissioner for his opinion on the effects on their terms and conditions of Employment Circular No.1 of 2018. The Applicants submitted that they were seeking a different order before this Court which was materially different from the relief they sought before the Labour Commissioner. Effectively they are asking the Court to restrain the Respondents from implementing Circular No.1 of 2018 while the Labour Commissioner is attending to their matter. The matter currently before the Labour Commissioner involves the same parties, is based on the same cause of action and although the form of relief claimed is not similar or identical, the proceedings before the Labour Commissioner are in respect of the same subject matter, that has been brought before the Court. In the circumstances and in the discretion of the Court, it is necessary that the Labour Commissioner who is seized with the matter be allowed to finalise same. In terms of Section 26 (3) of the Employment Act, if the Labour Commissioner's opinion is that the

changes introduced by Circular No.1 of 2018 are adverse to the terms and conditions of employment of the Applicants then those changes become null and void and of no effect and thus cannot be implemented. Should his opinion be otherwise, it will then be an opportune time for Applicants to approach this Court after attending to the provisions of Section 26 (4) of the Employment Act.

The point of law is upheld and the application accordingly dismissed. There will be no order as to costs.

The Members agree.



S. NSIBANDE

PRESIDENT OF THE INDUSTRIAL COURT

**For Applicants:** Mr. M. Mkhwanazi  
(Mkhwanazi Attorneys)

**For Respondent:** Mr. B. Tsabedze  
(Attorney General's Chambers)