# IN THE INDUSTRIAL COURT OF ESWATINI

**RULING**

Case No. 15/19

In the matter between:

**MINISTER OF LABOUR AND ANOTHER** Applicant

**And**

**NAPSAWU AND 3 OTHERS** Respondent

**Neutral citation:** Minister of Labour and Another v NAPSAWU and 3 Others *(15/2019)* [2019] *SZIC 02* (27 January 2019)

**Coram:** **S. NSIBANDE JP**

(Sitting with Nominated Members of the Court Mr M. Dlamini and Mr M. Mtetwa)

**Heard:** 27 January 2019

**Delivered:** 27 January 2019

## EX -TEMPO RE RULING

[1] The Minister of Labour and his Principal Secretary have brought an application to interdict a strike action by the 1st to 3rd Respondents. In so doing the Minister seeks to invoke **Section 89 of the Industrial Relations Act** in terms of which the Minister may apply to the Court for an injunction restraining the parties from commencing or from continuing with strike action whether such strike action is in conformity with the **Industrial Relations Act** or not.

[2] The Applicants further contend that the intended strike is not in conformity with the Act.

[3] The 1st to 3rd Respondents have indicated that they wish to respond to the application by filing a comprehensive response to the application and have sought to have the matter postponed to a later date wherein the parties will have filed their papers and heads of argument.

[4] The issue that arises before the Court at this point is whether the provisions of **Section 90 of the Industrial Relations Act** in particular **Section 90 (1)** come into play, if the matter is postponed to allow the Respondents to file their opposing papers. The Applicants submit that the section comes into play as their

application is pending before Court. The 1st to 3rd Respondents argue in the opposite stating that there is no matter enrolled before Court yet and secondly that because there is a Court Order declaring the strike action lawful, that order can not be interdicted. The order referred to was issued by this Court on 23rd September 2018. It was argued that since the Court had declared the strike lawful in September 2018 and that declaration has not been rescinded, set aside or abandoned then this Court can not come to a different finding and interdict the Court order. In essence it was being argued that the proverbial horse bolted when the Court Order declaring the strike lawful, was issued in September 2018. The Respondents further argued that the matter has not been enrolled and is therefore not pending before Court thus **Section 90** does not come into play; that **Section 90** does not operate automatically but must be proved; that no averments invoking **Section 90** have been made by the Applicants and they are therefore not entitled to an order in terms of that Section. The 1st to 3rd Respondents argued that because of the timeline they were given by the Applicants their right to be heard before an adverse order could be made against them was being infringed by the fact that they would be unable to file comprehensive opposing papers to the application unless they were given time to do so, and that while they were preparing their papers the strike action which had been deemed legal by the Court, would and should continue.

[5] Having heard the parties' arguments, we note the following –

(a) In terms of **Section 89 of the Industrial Relations Act**, the Minister is entitled to approach the Court for an order interdicting strike action whether it is in conformity with the provisions of the Act or otherwise if he considers such strike action threatens the national interest.

(b) The order of this Court of 23 September 2018 declaring the strike action lawful does not in anyway curtail the Minister's power to make such an application because he is entitled to do so whether the strike being threatened or taken is in conformity with this Act, if he feels the strike action threatens the national interest.

The question that arises is whether or not the application brought by the Minister is in relation to a dispute to which the strike action relates and whether the application is pending before the Court.

[5] The application brought by the Applicants is in our view currently pending before Court. The matter has been called in open Court; there have been arguments heard by the Court in relation to the application. That the Court is yet to hear arguments and decide whether the matter can be enrolled as one of urgency can not sustain the argument that only an administrative process has taken place in

giving the matter a case number. That there have been arguments on which the Court must decide means, in our view, that there is a matter in relation to a dispute to which the strike action threatened by the 1st to 3rd Respondents relates that is pending before Court. It would be absurd to hold otherwise. It must be noted that the Court has made no pronouncements as to the validity or otherwise of the Minister's application save to say it is pending before Court. That being the case it follows that in terms of **Section 90** no person organization, federation, or party to this dispute can continue or take strike action while this application is pending before Court.

[6] The 1st to 3rd Respondents in response to a point being made by the representatives of the applicant regarding the right to be heard made application that these proceedings be stayed pending determination of the point before the High Court because their constitutional right to be heard would be infringed by the operation of **Section 90 of the Industrial Relations Act**. The Applicants submitted that the right to be heard is not absolute and in so saying gave an example of the provisions of **Section 291 of the Companies Act** that deemed the liquidation process to be invoked simply by the filing of the application for winding up in Court.

[7] The right to be heard being a chapter 3 right was said by the Respondents to be an absolute right which they sought to have confirmed by the High Court. In terms of **Section 35 (3) of the Constitution of Eswatini** once such an application is made a subordinate Court must stay its proceedings pending the determination of that matter by the High Court, unless the application is frivolous or vexations.

[8] In the circumstances we find ourselves with no option but to stay these proceedings pending the determination of the question whether the operation of section 90 of the Industrial Relations Act interferes with the Respondents rights to be heard, as set out in **Section 33 (1) of the Constitution of Eswatini and whether such right is absolute or not.**

For purposes of clarity, the Respondents are prohibited **by Section 90 of the Industrial Relation Act** from continuing or taking strike action pending the determination of the Constitutional issue by the High Court as sought by the Respondents, and while the application is pending before this Court.

The members agree

**S. NSIBANDE**

**PRESIDENT OF THE INDUSTRIAL COURT**

**For the Applicants:** **Mr. S.M. Khumalo**

**For the Respondents:** **Mr. L. Howe**