



IN THE INDUSTRIAL COURT OF ESWATINI

JUDGMENT

Case No. 280/18

In the matter between:

INNOCENT NGCOBO & 12 OTHERS

Applicants

And

OSCAR VILAKTI & 13 OTHERS

Respondents

Neutral citation: Innocent Ngcobo and 12 Others v Oscar Vilakati and 13 Others (280/18) [2019] SZIC 06 (11 February 2019)

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

Date Heard: 1st October 2018

Date Delivered: 11 February 2019

Summary – Labour law –Applicants seeking an order in terms of Section 35 (i) of the Industrial Relations Act for Court to intervene to prevent violation of constitution of organisation.

Held – It is necessary to set out explicitly clauses of organisation’s constitution being violated, and to identify those violating the constitution.

Held – Application dismissed.

Held – In the Court’s mandate to promote the purpose objects of the Industrial Relations Act, the Commissioner of Labour is directed to intervene in the dispute.

JUDGMENT

[1] The 1st to 12th Applicants are all employed by the Eswatini Posts and Telecommunications Corporation and purport to be members of the National Executive Committee of the 13th Applicant, the Swaziland Communications and Allied Workers’ Union.

[2] The 1st to 11th Respondents are also in the employ of the Eswatini Posts and Telecommunications Corporation and also purport to be the lawful office bearers in the National Executive Committee (NEC) of the 13th Applicant.

[3] The Applicants have approached the Court in terms of **Section 35(1) of the Industrial Relations Act 2000** as amended and seek the following orders:

1. *That an order be and is hereby issued directing that an extraordinary meeting of the members of the 13th Applicant be convened on Sunday the 14th October 2018 or any such other suitable date as may be determined by the above Honourable Court.*
2. *That the said extra-ordinary meeting should inter alia make a resolution and/or decision on the lawful office bearers within the national Executive Committee Structure of the 13th Respondent.*
3. *That an order be and is hereby issued directing the 12th Respondent or any officer designated by him to facilitate and convene the meeting referred to in paragraph (1) above.*
4. *That 12th Respondent or the officer designated by him in terms of paragraph (3) above be and is hereby authorised to withdraw funds held with the 14th Respondent only for purposes of facilitating the meeting referred to in paragraph (1) above.*

5. *That upon facilitating the meeting referred to in paragraph (1) above, the 12th Respondent and/or his officer (s) must report to all stakeholders about the outcome and/or resolution of the said meeting regarding the NEC of the 13th Applicant.*
6. *Costs of the application against 1st to 11th Respondents in the event of unsuccessful opposition hereto.*
7. *Further and/or alternative relief.*

[4] The Applicants' application is primarily that the Court intervenes and directs that the 13th Respondent holds an extra-ordinary general meeting the purpose of which will be that the two factions that purport to be the 13th Applicant's duly elected NEC will each give a report on how and when and by whom they were elected into office so as to enable the members of 13th Respondent to take a resolution on which NEC is correctly in office.

[5] It was the Applicants' submission that as affected parties, they were entitled in terms of **Section 35 of the Industrial Relations Act 2000** as amended to bring the application to court for purposes of stopping the

violation of the provisions of the 13th Applicant's constitution and that the Court was empowered to intervene with an appropriate order in such circumstances.

[6] The 1st to 12th Applicants (herein after referred to as **the Applicants**) submitted that the contestation of office between themselves and the 1st to 11th Respondents (**the Respondents**) had created a crisis with the 13th Applicant to the detriment of its members whose welfare was now being affected. The Applicants' main concern was that they were unable to call an extra-ordinary meeting of the members of the 13th Applicant, the purpose of which would be for members of 13th Applicant to decide on the rightful members of its National Executive Committee. It was alleged that all efforts to call the extra-ordinary meeting were defeated by the Respondents who would issue a notice, counter to that issued by the Applicants, advising members of the Union that there was no such meeting and that the notice issued by the Applicants was to be ignored.

[7] The application was opposed by the Respondents who raised certain points *in limine*. By agreement of the parties the points *in limine* and the merits of the application were argued simultaneously. The first point raised was one of *locus standi*, it being submitted that the Applicants had failed to

establish same by failing to prove that the 13th Applicant is an organisation duly registered in terms of **Section 27(7) (a)** of the **Industrial Relations Act 2000 as amended**.

[8] The 2nd point raised relates to the applicability of **Section 35** of the **Industrial Relations Act 2000 as amended** to this matter with the Respondents arguing that the said section was not applicable because no infringement of the 13th Applicant's constitution had been shown to have been committed by the Respondents or anyone else.

[9] *Locus standi*

The point of *locus standi* appears to us to be misplaced. **Section 26(3)** of the **Industrial Relations Act 2000 as amended** provides that “An organisation of employees shall be deemed to have been formed on the date on which six or more employees agree in writing to form such organisation”\

It is not necessary, in our view, for the Applicants to show that 13th Applicant is a union registered in terms process set out in **Section 27 of the Industrial Relations Act** since the union comes into existence on the date six or more employees agree to form the organisation. There are 12

Applicants who claim to be members of the union. Their membership has not been put in dispute. A constitution is attached to the papers. It follows that the Union exists as an organisation despite not being registered in terms of process set out in section 27. The members of the union have the *locus standi* to bring the application.

The point in *limine* will therefore fail.

[10] Lack of cause of action

The Respondents submitted that application was misdirected in that **Section 35 of the Industrial Relations Act** is not applicable because there was no infringement of the constitution that has been pointed out by the Applicants.

In this regard it was submitted that:

(i) A mass meeting may be called by a vote taken by a two thirds majority of union membership (in terms of the Union's constitution).

The Applicants have not explored this option.

(ii) A special congress (in terms of Rule 12 (2) of the Union's constitution) with power of a Quadrennial Congress could be called but the Applicants have also failed to exercise this option.

In the circumstances, it was submitted, there was no infringement of the Union's constituted alleged against the Respondents or any other party.

[11] With regard to the application before us, the Applicants state in their founding affidavit that it has been impossible to call a mass meeting in the normal way. They say that the application is brought in terms of **Section 35 (1)** of the **Industrial Relations Act** and is aimed at normalising the presently untenable situation existing within the affairs of the 13th Respondent.

Nothing further is said in the papers regarding **Section 35**. No specific act of transgression against the constitution of the Union is made. There is no specific reference to any article of the Union's constitution made by the Applicant's on the papers. It is not specifically indicated how the failure to call an extra-ordinary general meeting constitutes a failure to comply with the Union's constitution.

[12] In terms of the Union's Constitution an extra-ordinary General meeting is called in terms of Rule 10 thereof. The Rule reads as follows:

10.1 ***“An extra-ordinary General Meeting may be convened at any time, if there are compelling circumstances, by the National Executive Committee or a vote taken by a two thirds majority of the Union Membership.”***

While it is understandable that there being two factions both claiming to be the Unions legislation NEC, it would be difficult for the NEC to call the Extra-Ordinary General Meeting, it is not clear if the Applicants sought a vote for the Extra-Ordinary General Meeting by the Union's membership, as set out in Rule 10 of the Union constitution. It would be expected that they would do so before approaching the Court to intervene.

[13] Further, as submitted by the Respondents, Rule 12 of the Constitution enables for the calling of a Special Congress either by the NEC or a vote taken by every branch of the Union's entire membership by a two thirds majority of all branches of the Union.

[14] The Applicants do not say whether they have attempted to mobilise the branches to call for such a special congress nor do they say they were prevented from doing so in the exercising their constitutional right to call for such a congress, by the Respondents who would then have been in breach of the Constitution.

[15] It would appear to us that in order to succeed it is necessary for an applicant approaching the Court in terms of **Section 35(1)** to indicate

explicitly, what article of the Union Constitution is being infringed, by whom and in what at manner. In the absence of such the application cannot succeed.

[16] Ordinarily, in view of our findings above, the Court would be inclined to simply dismiss the application. However, in terms of the Courts mandate captured in **Section 8(4) of the Industrial Relations Act** - *“In deciding a matter, the Court may make any other order it deems reasonable which will [promote the purpose and objects of this Act”* - we find it necessary order that the Commissioner of Labour be directed to intervene in terms of **Section 82 of the Act** to resolve the dispute between the Applicants and the Respondents. It is clear from the pleadings filed by both parties that there exists an impasse created by the two factions. Such a situation is not in the interests of good industrial relations. In the circumstances the Court makes the following Order:

1. **The application is dismissed.**
2. **Each party is to pay its own costs.**
3. **The Commissioner of Labour is hereby directed to intervene with immediate effect, in the dispute between the parties in**

terms of Section 82 of the Industrial Relations Act 2000 as amended.

- 4. The Registrar of the Court is directed to bring this order to the attention of the Commissioner of Labour.**

The Members agree



S. NSIBANDE

PRESIDENT OF THE INDUSTRIAL COURT

For Applicants: Mr. B.S Dlamini

For Respondents: Mr. M. Simelane