IN THE INDUSTRIAL COURT OF ESWATINI

JUDGMENT

Case No. 15/2019

In the matter between:

MINISTER OF LABOUR AND SOCIAL SECURITY 1st Applicant

P.S MINISTRY OF PUBLIC SERVICE 2nd Applicant

And

NATIONAL PUBLIC SERVICES & ALLIED

WORKERS UNION 1st Respondent

SWAZILAND NATIONAL ASSOCIATION
OF TEACHERS 2nd Respondent

SWAZILAND NATIONAL ASSOCIATION

OF GOVERNMENT ACCOUNTING PERSONNEL 3rd Respondent

SWAZILAND NURSES ASSOCIATION 4th Respondent

Neutral citation: Minister of Labour and Social Security and Another v National Public Service & Allied Workers Union and 3 Others *(15/2019)* [2019] *SZIC 63* (29 July 2019)

Summary: *Labour Law – Applicants in terms of* ***Section 89 (1) of the Industrial Relations Act 2000 (as amended)*** *– Application seeks to interdict and restrain Respondents members from participation in strike action. Minister to prove that national interest is threatened or affected to the satisfaction of the Court – Applicability of* ***Section 90 of the Industrial Relations Act*** *where application in terms of* ***Section 89(1)*** *is made – Interdicts in perpetuity not in the public interest or interest of labour relations – Distinction between what is political and what is trade unions business difficult to distinguish but where demand ensued through strike action includes an occupational demand then legitimacy of strike must be recognised.*

Coram: **NSIBANDE S. JP**

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

Last Heard: 06 May 2019

Delivered: 29 July 2019

JUDGMENT

[1] The Applicants, the Minister of Labour and Social Security and the Principal Secretary in the Ministry of Public Service brought an application to Court on Sunday 27th January 2019 for an order in the following terms:-

"1. Dispensing with the normal time and limits of the Rules of the above Honourable Court and enrolling the matter as urgent;

1. Condoning the Applicants' non-compliance with the Court's rules on forms, dies *and manner of service;*

2. Interdicting and restraining the Respondents or anyone from embarking upon a strike action (sic) or any industrial action scheduled to commence from 28th January 2019 at the instance of the Respondents as per the notices to strike served upon the Government of Eswatini and the press statement published in the Times of Swaziland on 21st January 2019, pending the report back to Court per prayer 4 below;

3. *Ordering the Applicants to report periodically beginning six months after the tabling of the National Budget to the above Honourable Court on the affordability and sustainability of the cost of living adjustment;*

4. *Further and/or alternative relied as the Court may deem fit."*

[2] The Respondents (commonly known as Public Sector Associations) opposed the application. All 4 Respondents initially sought time to file opposing papers and indicated an intention to raise and argue certain points *in limine*. However, when the matter was recalled, after the initial adjournment, the 4th Respondent (the Swaziland Nurses Association) indicated that it, being a representative of employees in an essential service, would not be taking part in the strike action and would therefore not be taking any further part in the Court process. The remaining three Respondents (the National Public Service & Allied Workers Union, the Swaziland National Association of Teachers, and the Swaziland National Association of Government Accounting Personnel) filed their opposing papers accordingly.

[3] The application arises out of notices of intention to embark on strike action on 28th January 2019, given by the Respondents to the Applicants following that this Court, on 3rd October 2018, deferred a strike action proposed by the

Respondents to 23rd November 2018 and further directed that, should it become necessary to commence strike action the Respondents were to give Government new dates for the proposed strike, after 23rd November 2018. The notices advised that the 28th January 2019 was the new date for the commencement of the strike action.

[4] When the matter was first called in Court on the 27th January 2019, the Respondents sought time to prepare their opposing papers and indicated that they would be in a position to file their papers during the morning of 28th January 2019, the day on which the strike action was scheduled to begin. This then raised the contentious issue of whether **Section 90 (1)** of the **Industrial Relations Act** (as amended) (**The Act**) would apply. In terms of this section *"A person, organisation, federation or party to a dispute shall not continue, or take strike action or institute a lockout while proceedings in relation to a dispute to which that action relates are pending before the court or an arbitrator."*

We delivered our ruling on the applicability of **Section 90 (1)** on the same day concluding that the section applied in this matter. Reference is made to the ruling dated 27th January 2019.

[5] Despite the fact that the matter was argued some months after it first came before the Court, the Respondents insisted that the issue of urgency was alive

and ought to be dealt with. The Respondents argued that the Applicants failed to make out a case for urgency in their founding affidavit as required by the Rules of Court; that the Applicants had not explained what renders the matter urgent and had not clearly stated the prejudice they would suffer if the matter were to take its normal course. It was argued further that the urgency was self-created in that Applicants were notified as far back as November 2018 that the Respondents would embark on strike action on 28th January 2019. They were notified again on 18th and 21st January 2019. The Respondent argued that the Applicants waited to move the application at the eleventh hour. It was the Respondents' submission that the matter stood to be dismissed for want of urgency with an appropriate award of costs.

[6] The Applicants state in their papers that the matter is urgent because the scheduled strike had gone beyond a labour dispute and had become unlawful due to the fact that it now included issues that were not conciliated on and seeks to invite non-parties to the dispute and that the Respondents have created an imminent threat to loss of life by threatening to shut down clinics, health centres and hospitals. These submissions were based on the statement made by the Respondents in the Times of Swaziland dated 21st January 2019.

[7] The Applicant further states that the urgency is not self-created but that the Government of Eswatini was engaged in extra-curial means to avert the strike. In particular it was stated that the new Cabinet had been in negotiations with the Respondent until 25th January 2019 when it became clear that the Respondents intended to proceed with the strike action. It was submitted that the Applicants acted with haste to approach the Court following the break-down of discussions between the parties.

[8] That, in a nutshell were the arguments from the parties on urgency. The issue of urgency is governed by **Rule 15 (2)** of the Rules of this Court. **Rule 15(2)** reads as follows:

"15(2) The affidavit in support of the application shall set forth explicitly –

(a) The circumstances and reasons which render the matter urgent;

(b) The reasons why the provisions of Part VIII of the Act should be waived; and

(c) The reasons why the Applicant cannot be afforded substantial relief at a hearing in due course.

(3) On good cause shown, the Court may direct that a matter be heard as one of urgency."

[9] As already alluded to, by the time the point on urgency was argued, the Court had issued an interim order in terms of **Section 90** of **the Act** and the parties had filed all the pleadings due. Effectively the matter had been enrolled and the court had even had to refer a constitutional question to the High Court at the behest of the Respondents. The High Court of Eswatini has had occasion to consider the question on whether once the Court has granted interim relief, ordered papers to be filed and set a matter down for hearing, where a case is launched on an urgent basis, this automatically renders the point *in limine* raised on urgency archaic. In the matter of **Hellenic Football Club v National Football Association of Swaziland and Others High Court Case No. 175/10**, the Court held that the question of urgency will remain open in these circumstances, only where the Court has demonstrated that it still has to pass master, before granting interim orders or ordering processes to be filed. In *casu*, when the matter was called on 27th January 2019, the issue of urgency was not raised at all. The issue of the applicability of **Section 90** of **the Act** brought to the fore and was the issue the Respondents prioritised and sought to argue. In the circumstances and in our view, the matter was effectively enrolled and the issue of urgency has been overtaken by events.

In any event we align ourselves with the words of **Ota J in Banjwayini Shongwe v Abraham Shongwe and 11 Others Civil Case No.1236/2012** where, dealing with the High Court Rule on urgency (Rule 6 (5) of the High

Court Rules). At paragraph 25 of the judgment the learned judge states *"Now the question of urgency is not a technical one. It is one of substance to be gathered from the totality of the facts in the relevant affidavits serving before Court. I will not limit myself to paragraph … but will consider the totality of the facts contained in the said Founding affidavit in deciding this issue."*

[10] On the facts stated in the affidavit and certificate, in particular those pertaining to the statement of 21st January 2019 issued by the Respondents that threatened the shut-down of all government services, including health services, we are in no doubt that the application was indeed urgent.

[11] In the circumstances the point on urgency is dismissed and the matter is enrolled accordingly.

[12] The Respondents have raised further points in terms of which they argue that the Applicants have not met the legal requirements for the order sought; that the matter is *res judicata* because the Court Order issued on 3rd October 2018 still stands; and whether **Section 89** gives Applicant a clear right to an interdict. It appears to us that these matters are not only intertwined but that they form part of the merits of the matter. In the circumstances and to avoid unnecessary repetition we shall proceed to deal with the merits of the case.

[13] The background to this matter is that the parties having been involved in negotiations regarding cost of living adjustments for the year 2017/2018 were unable to come to any agreement with the Eswatini Government's negotiation team contending that it would only offer a zero percent adjustment due to fiscal and cash flow challenges faced by the Government. The result was a deadlock and the matter could not be resolved at the Conciliation Mediation and Arbitration Commission (CMAC). A certificate of unresolved dispute was issued by CMAC in January 2018.

[14] Consequent to the issuance of the certificate, the Respondents undertook the steps necessary to engage in industrial action, in terms of **the Act,** leading up to the issuance of notices to the Eswatini Government of their intention to undertake strike action. The Government, through the Ministry of Labour and Social Security approached the Court seeking to interdict the strike so notified. The matter was heard and this Court deferred the strike to the 23rd November 2018 (See in this respect Annexure SG2 of the Founding Affidavit).

[15] Following the issuance of the notices to embark on strike action given to the Applicant on 29th November 2018 and subsequently on 18th and 21st January 2019, the Respondents prepared to embark on a strike action on 28th January 2019. On 21st January 2019 a press statement appeared on page 4 of the Times

of Swaziland, purportedly, issued by the Public Sector Association of Swaziland (PSAS) Secretariat. The statement is headed **"STATEMENT OF THE PUBLIC SECTOR ASSOCIATIONS OF SWAZILAND (PSAS) – THE SWAZILAND NATIONAL ASSOCIATION OF TEACHERS (SNAT); THE SWAZILAND ASSOCIATION OF GOVERNMENT ACCOUNTING PERSONNEL (SNAGAP); THE SWAZILAND NURSES ASSOCIATION (SNA) AND THE NATIONAL PUBLIC SERVICES AND ALLIED WORKERS UNION (NAPSAWU) ON THE COST LIVING ADJUSTMENT (COLA) FOR THE YEARS 2017/2018 AND 2018/2019."**

[16] This statement caused the Applicants to spring into action and bring to court the current application in terms of **Section 88 and 89** of **the Act.** It was the Attorney General's submission that the press statement tainted what would otherwise have been a strike action within the provisions of the Industrial Relations Act. The legal strike was, according to the Attorney General, tainted due to the following:

(i) The issue conciliated upon in terms of the **Certificate of unresolved dispute** is stated at page 18 of the book of pleadings as "**Cost of Living adjustment 2017/18"**, however the statement now speaks of the "Cost of

Living adjustment (COLA) for the years 2017/2018 **AND 2018/2019** (my emphasis).

(ii) The complaints about Government continuing to do the following, whilst certain listed problems were deepening;

- *"Increase budget for state security organs which are the Army, Police and Correctional Services*
- *Unrelentingly increased recruitment in the aforementioned departments.*
- *Drastically decreased recruitment in other significant departments such as Education, Health and Public Service…"*

It was the Attorney General's submission that these matters as articulated above fell outside the matters conciliated on at CMAC; that the Respondents were not entitled to include these matters in their intended strike nor were they entitled to call the general public to join in on the strike as they had done so in the press statement – "*As the Public Sector Unions in the country, we will be engaging in a national strike from 28th January 2019 and as such we call upon every concerned Swazi, from all walks of life who associates with the problems that were highlighted above to partake in this National Activity*."

[17] It was the Applicant's further submission that this press statement includes the Swaziland Nurses Association which by virtue of being an essential service is precluded from taking strike action **(See Section 91 of the Industrial Relations Act 2000 as amended)**. The inclusion of the Nurses Association in the strike not only tainted the process, so said the Attorney General but also threatened the national interest and galvanised the Minister to bring this application in terms of **Section 89 of the Industrial Relations Act 2000 as amended**. In terms of **Section 89 (1)** *"If a strike or lockout is threatened or taken,* ***whether in conformity with this Act or otherwise****, and the Minister considers that the national interest is threatened or affected thereby, he may make an application to the Court for an injunction restraining the parties from commencing or from continuing such action, and the Court may make such order thereon as it considers fit having regard to the national interest."*

[18] The Applicants referred the Court to the case of **Minister of Labour and Social Security v Swaziland Transport and Allied Workers Union Industrial Court Case No. 17/2012** for an indication of what the Court will look for in order to grant the injunctive relief sought in terms of **Section 89 (1)**.

[19] The Court was also referred to **Nedbank Swaziland Limited v Swaziland Union of Financial Institutions and Allied Workers Union ICA Case**

No.11/2006 to support the proposition that even a legal strike can be interdicted where the Minister is able to show that it is in the national interest to do so and where the strike action has been tainted by some illegality.

[20] The final argument of the Attorney General was that the press statement renders the strike as a political one; that some of the matters listed in the statement are of a purely political nature, an example being the issues listed under the head – **ATTENDANT PROBLEMS OF THE GOVERNMENT'S FISCAL ILL, DISCIPLINE** of the statement. It was the Attorney General's submission that strikes of a purely political nature do not fall within the ILO's principles of the right to strike even where there is validity of the purpose of the strike. Various authorities were cited including **Bernard Gernigon and Others (1998) ILO Principles concerning the Right to strike**.

[21] The Attorney General then raised two further arguments, firstly in support of prayer 4 of the application and secondly under the further and/or alternative relief prayer.

With respect to the support of prayer 4, the argument was that even if the strike action was allowed to take place, it would be inconsequential because the Eswatini Government was unable to comply with the demand for COLA; that as a gesture of the Government's good faith, it was willing to make periodical

reports on the affordability and sustainability of the COLA to the Court. It was the Applicant's submission that in terms of **Section 2** of **the Act**, *"Strike action is taken with a view to inducing compliance with any demand concerned with the employer-employee relationship."* It was Applicants' argument that as a result of the financial challenges, even if the Respondents were to go on strike the Government of Eswatini was in no financial position to accede to their demand. It was in the interests of all parties to allow the Applicants to make periodic reports to the Court, on progress in the state of economic recovery so that it becomes clear to all parties, in an open and transparent process, when the financial situation has been turned around and the Government is in a position to award and pay the cost of living adjustment, which it admits is due.

[22] In addition, the Attorney General argued that under the further and/or alternate relief, the Applicants were praying for the interdiction of future industrial action that will be undertaken by the Respondents in pursuit of their demand for the current cost of living adjustment dispute and any future disputes regarding COLA. The basis of this argument was that the financial situation has not changed and will take a time to change. In the circumstances, it was argued that it would be pointless for the Respondents to undertake strike action over COLA because Government was not on a position to award such until the fiscal

position improved and payment of the COLA is sustainable and payable. These in essence were the submissions of the Applicants.

[23] The Respondents case as argued before the Court and as contained in the heads of argument is that – (i) The Applicants have not met the legal requirements for the Order they seek; in this respect, it was argued that this Court's Order of 3rd October 2018 remains binding and effective in so far as it has not been rescinded or varied. It was argued further that the Respondents had given the notice required at law for the proposed strike in keeping with the said order of Court of October 2018. It was the Respondents' submission that because the new notices were issued, in November 2018 and January 2019, the Court had become *functus officio*. The Order of Court had not been challenged and could not be interdicted. The horse bolted when the Order was issued in October 2018, so the arguments went, and the strike could not be interdicted at this stage, with the Respondents having satisfied the requirements of **the Act** with regard to undertaking a legal strike. The matter was therefore *res judicata*; that the Court had declared the strike legal and the Minister could not again approach the Court. Secondly, the Respondents argued that the Applicants having approached the Court in terms of **Sections 88 and 89** of **the Act**, failed to prove that there was a threat to the national interest and that it was in the national interest to stop the strike; that the Applicants seek to invoke the

provisions of **Section 88** incorrectly since the strike is a legal one and all the requirements of a legal strike have been met; that since the 4th Respondent had removed itself from these proceedings, no threat to life now existed; that everything else that would result from the strike, (children not being taught; revenue officials not attending to public etc) would be a consequence of a lawful strike action and would not amount to extra ordinary consequences.

[24] With regard to the press-statement issued by the Respondents, it was argued that there is nothing political about the statement, that **Section 32 of the Constitution of Eswatini** guarantees workers' rights and that the statement falls within the ambit of freedom of speech, as the Respondents were calling on their members to attend the strike in numbers.

[25] The Respondents further argued that the National Interest is defined in Section 2 of the Industrial Relations Act to mean "a matter which shall have or is likely to have the effect of endangering the life, health or personal safety of the whole or part of the population." It was argued that since the 4th Respondent had indicated that it would not be striking then there was no danger to life or health or personal safety of even a portion of the population. The economic issues raised by the 1st Applicant fall outside the definition of the national interest and must not be considered by the Court the Respondents argued.

[26] With regard to the relief sought on prayer 4 and under further and/or alternative relief, it was the Respondents' submissions that such orders would be against the public interest; that if the Court were to grant an indefinite interdict as prayed for it would in effect kill the only power that employees hold, that of withholding their labour.

[27] The Respondents also made submissions regarding the applicability of **Section 90** of **the Act** to this matter. It was submitted that in terms of the said section an Applicant is expected to show (i) the existence of a dispute between the parties and (ii) that the matter is pending before court. It was submitted that there is no dispute existing between the parties with regard to the notified strike action, because the Court, in October 2018, declared the strike action lawful. Secondly and for the same reason, the Respondents submitted that there was no matter pending before the Court because there had been no order granted enrolling the matter as urgent as prayed for by the Applicants. That in essence were the submission of the Respondents.

[28] We are mindful of our ruling on the applicability of **Section 90** that we delivered on 27th January 2019. We are mindful also of the fact that we are not

entitled to review or to hear an appeal on our own decision. Be that as it may and for the sake of clarity on our ruling we will say the following –

28.1 In this matter proceedings were brought to this Court by the Applicants on 27th January 2019 and were brought before the Court on the same day. The Respondent raised the issue of the applicability of **Section 90** of **the Act** and sought the Court to make a ruling thereon. We made a ruling on why we held that there was a matter pending before the Court and refer to paragraph 5 of ruling in that respect.

28.2 Is there a dispute between the parties relating to the proposed strike action since it was declared lawful by the Court? Is it our view that the declaration of the strike as legal in October 2018 does not settle the dispute between the parties. The Respondents' notifications to engage in strike action were premised on the unresolved dispute regarding the cost of living adjustments. In other words, it is because there is an unresolved dispute between the parties that the Respondents want to undertake strike action. The threatened strike is in respect of that unresolved dispute and it is in respect of that unresolved dispute that there is a matter pending before Court in which the 1st Applicant seeks an injunction. We can say nothing further in respect of this section and its applicability.

[29] We move on to prayers 4 and the prayer under further and/or alternative relief with which we intend to deal concurrently. The Applicant prays for the Court to order that it gives periodical reports on the affordability and sustainability of the cost of living adjustment and to also interdict future strikes relating to the COLA dispute until the payment of COLA is sustainable. In considering this prayer, we have had regard for **Section 4** of **the Industrial Relations Act 2000 as amended**. **Section 4 (2)** thereof reads –

"(2) Any person applying or interpreting any provision of this Act shall take into account and give meaning and effect to the purposes and objectives referred to in subsection (1) and to the other provisions of this Act."

Part of the purposes and objectives of the act listed in **Section 4(1)** include to:

"(d) promote harmonious industrial relations;

(c) Promote freedom of association and expression in labour relations;

(e) Protect the right to collective bargaining;

(i) Stimulate a self-regulatory system of industrial and labour relations and self-governance."

In keeping with the purpose and objectives of the Act, it is our view that to grant the orders prayed for would be detrimental to the objectives we have highlighted. While it is commendable that the Government of Eswatini wishes to be candid, open and transparent to its employees about its fiscal position by making periodical reports to the Court, there is nothing

preventing it from doing so directly to the Respondents. It is in the interests of good industrial relations that the parties govern their own relationship. In the promotion of collective bargaining and the freedom of association, the parties can on their own, engage each other candidly on these issues without involving the Court. The openness and transparency the Applicants wish to display regarding their fiscal position can be displayed in employer/employee discussions without the involvement of the Court. Secondly, on the issue of the interdict of future strikes, our view is that the Respondents' attorney was correct when he submitted that such interdicts were generally taken to be against the public interest. In this regard we are of the view that such an order would result in other employers pleading financial difficulties and applying to the Court to interdict the only power held by employees. It would curtail the ability of employees to engage in lawful strike action and it can not therefore be in the public interest to issue such an order.

[30] The crux of the Respondents' resistance to the merits of the application appears to be that because this Court declared the strike legal in October 2018, then the Applicants can not again approach the Court for injunctive relief against the strike. It is common cause that this Court declared the strike legal in October 2018 and deferred it to any date after 23rd November 2018 with an order that the

Respondents give proper notice of their intention to strike should it become necessary.

It is common cause that the Respondents gave notice to strike in November 2018 and also on two occasions in January 2019.

It is also common cause that on 21st January 2019, a Statement was issued by the Respondents through the Times of Swaziland in which they make mention of the "**Cost of Living Adjustment (COLA) for the year 2017/2018 and 2018/2019**".

It is common cause that in that statement the Respondents indicated that Government systems would be down during the strike. Included in the Government Systems that would be down from the 28th January 2019 were clinics, health centres, hospitals and transport department.

It is common cause that the Swaziland Nurses Association (SNA) was a signatory to the said statement.

It is common cause that the 1st Applicant thereafter approached this Court in terms of **Section 89** of the **Industrial Relations Act** as amended.

The questions that arises herein are whether in the face of this Court's order of 3rd October 2018 the Minister was entitled to bring this application; and if he was, whether he has met the legal requirements of the interdict he seeks; and whether he has established that the national interest deems that an injunction against the strike be issued.

[31] Section **89(1)** of **the Act** is the relevant section and reads – *"If any strike or lockout is threatened or taken, whether in conformity with this Act is otherwise, and the Minister Considers that the national interest is threatened or affected thereby, he may make an application to the Court for an injunction restraining the parties from commencing or from continuing with such action, and the Court may make such order thereon as it considers fit having regard to the national interest."*

[32] On a normal reading of this section, it appears to us, that the Minister is entitled to approach this Court whether the threatened strike is legal or not, once he considers that the national interest is threatened. It may be argued, as it is by the Respondents, that this Court had considered an application by the Minister and found that the Respondents could in fact proceed to strike action; that in those circumstances the Court could not change its mind at this stage to entertain the Minister's application again. This argument ignores the fact that on 21st January 2019 the Respondents issued a statement in the local press in which the intention to shut down clinics, health centres and hospitals, among other departments, was made. It is this statement that made the Minister approach the Court once again. It is common cause that when the Court made its decision in October 2018, there had been no such statement made and it was

not a part of that application by the Minister. Had the Respondents simply issued and served their notices as they did and then proceeded to strike action, the Court would have been *functus officio*. But the Respondents did not do so, they issued a statement in the press. Having read the statement, the Minister considered that the national interest was threatened by the strike, the notices of which he had received in November

2018 and January 2019. In our view, the Ministry was entitled to approach the Court, following that the Respondents had introduced a new issue regarding the strike, through their statement. In the circumstances it cannot be said that the Court is precluded from addressing the Minister's concerns which have never come before the Court previously.

[33] Has the Minister made a case for the injunctive relief he seeks and has he established the threat to the national interest?

The Respondents argued that the requirements of an interdict (clear right, an injury actually suffered or reasonably apprehended the absence of any other satisfactory remedy) had not been met. They argued that **Section 89 (1)** did not give the Minister a clear right; that **Section 88** of **the Act** in fact gave certain other remedies that could be available to the Applicants other than an injunction. Having regard to **Section 89(1)** it appears that for purposes of making the application to Court, for the injunction, the Minister need only

consider that the national interest is threatened or affected by the strike action or the threatened strike action. It appears to us that the common law requirements of an interdict do not apply in an application brought in terms of **Section 89 (1)**. It appears that the legislature gives latitude to the Minister to apply for an injunction if, he considers the national interest to be threatened. This position appears to be supported by the case of **Minister of Labour and Social Security v Swaziland Transport and Allied Workers Union and Swaziland Commercial Amadoda Transport Association Industrial Court Case No. 172/2012** where at paragraph 17 of the judgment the Court states *"In seeking the injunctive relief, the Applicant has to prove to the satisfaction of the Court that national interest is threatened or affected by the action of the Respondent."* It appears to us that, that is the only requirement the legislature places on the Minister. Once he considers that the national interest is threatened or affected, he can apply for an injunction against the strike and must prove to the satisfaction of the Court that the national interest is indeed threatened.

[34] Has the Minister shown that the national interest is threatened or will be affected if the Respondents proceed to strike?

In answering this question, the Court has to have regard to the statement of 21st January 2019 and the behaviour of the erstwhile 4th Respondent (which eventually removed itself from the matter). The statement is admitted by the

Respondents. No aspect of it was denied. It is common cause that the Respondents threaten to shut down clinics, health centres, hospitals and transport among other government services. The national interest as defined in **Section 2 of the Act** means, *"a matter which shall have or is likely to have the effect of endangering the life health or personal safety of the whole or part of the population."*

There is no doubt in our minds that a threat to shut down clinics, health centres, hospitals and transport will have or is likely to have the effect of endangering the lives of part of the population at the very least.

[35] The narrative of the Respondents was that since the erstwhile 4th Respondent had removed itself from these proceedings by telling the Court, through its counsel that they were not going on strike, then the national interest is no longer threatened, if it even was, because nurses would be at work. The Respondents further argued that the shutdown of schools and government offices was a natural consequence of strike action and could not be seen as a threat to national interest as it threatens neither lives nor health.

It is correct that the shutting down of schools and offices where those who work have gone on strike is a natural consequence of strike action and can not be seen as threatening the national interest.

However, this submission ignores the fact that the Swaziland Nurses Association represents employees in an essential service and that it would have been absurd for the erstwhile 4th Respondent to stay involved in these proceedings when it was not entitled to go on strike in the first place. In terms of **Section 91 of the Act,** an *"employee engaged in an essential service shall not take strike action."*

Having removed itself from the proceedings, the erstwhile 4th Respondent said nothing about the press statement which it had signed, it did not disown it nor did it withdraw itself from the sentiments expressed in the statement – that *"all Government systems would be brought to a complete halt"*, including clinics, health centres and hospitals. Thus, in so far as the statement is concerned there has been no unequivocal withdrawal of same by the Swaziland Nurses Association and it remains.

[36] It was the Applicant's submission that the statement also taints what would have been a legal strike because it firstly introduces COLA 2018/2019 as a reason for the strike whereas there had been no conciliation on that matter nor has there been a certificate of unresolved dispute issued (at least at the time that the matter was heard in Court). The strike was said to be tainted with illegality also because it had the hall marks of a political strike because the issues raised in the statement took a political tone.

It is common cause that the parties have an unresolved dispute regarding the COLA 2017/2018 and that the Respondents have gone through all the steps in the Act required for them to undertake strike action.

It is common cause that the statement of 21st January raises specific issues relating to what the Respondents call Government's fiscal ill-discipline. The statement complains of Government prioritising, for example, the state security organs instead of health and education. These matters and the other matters raised may appear to be of a political nature. As the ILO Principles concerning the Right to Strike by **Bernard Gernigon et al**, states *"Strikes of a purely political nature… do not fall within the scope of the principles of freedom of association."*

However, the authors state also that the Committee on Freedom of Association has specified that it is difficult to draw a distinction between what is political and what is properly speaking trade union in character and that these two motions overlap. The authors at page 15 state that *'the committee on Freedom of Association's attitude in cases where the demands pursued through strike action include some of an occupational or trade union nature and others political nature, has been to recognise the legitimacy of the strike when the occupational or trade union demands expressed did not seem merely a pretext disguising purely political objectives unconnected with the promotion and defence of workers interests."*

We align ourselves with such attitude. With regard to the facts of this matter the main issue of the strike is the COLA dispute which is a legitimate demand of the PSA's. The Applicants themselves have admitted that the dispute exists only because they are unable to pay same due to the fiscal challenges the Government faces. In keeping with the attitude of the Committee on Freedom of Association we cannot say that the proposed strike is one of a purely political nature.

[37] The Respondents however have the difficulty that the exclusion of the COLA 2018/2019 was not explained that the Respondents seek to undertake strike action on a matter that was not conciliated on and has not gone through the gauntlet of the requirements set out in **the Act** taints the proposed strike action with illegality. It is not possible, in our view to say that the strike in respect of COLA 2018/2019 only be prohibited at this stage. It cannot be separated from the "legal" strike. To pick from the **Nedbank Swaziland Limited v Swaziland Union of Financial Institutions and Allied Workers Union Appeal Case No.11/2006**, "*The right to collective bargaining by necessity includes adherence to fair play and adherence to the laws of the land."* To include a matter that has yet to be conciliated on in an effort to induce compliance from the employer in our view so tainted the process as to make the strike unlawful.

[38] Taking into account all of the above reasons the strike action cannot be allowed to continue in its present form even if the matter now included in the statement is excised and the employees who are part of essential services are excluded. In our view, the Respondents would require to issue fresh notices in order to achieve the legal requirements for protected strike.

[39] Accordingly the Court makes the following order:

(a) The Respondents and their members or any person acting their behest or in concert with them are hereby interdicted and restrained from embarking on or the strike action proposed 28th January 2019.

(b) We make no order as to costs.

The members agree.

S. NSIBANDE

PRESIDENT OF THE INDUSTRIAL COURT

For the Applicants: Mr. S.M. Khumalo

For the Respondents: Mr. L. Howe