



IN THE INDUSTRIAL COURT OF ESWATINI
JUDGMENT

Case No. 166/19

In the matter between:

MONTIGNY INVESTMENTS LIMITED

Applicant

And

AMALGAMATED TRADE UNION

OF SWAZILAND (ATUSWA)

1st Respondent

THE NATIONAL COMMISSIONER OF POLICE

2nd Respondent

Neutral citation: Montigny Investment Ltd v Amalgamated Trade Union of Swaziland (ATUSWA) [2019] SZIC 88 (16 September 2019)

Coram: **S. NSIBANDE JP**

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

Heard: 12 June 2019

Delivered: 16 September 2019

Summary: Application for interdict – Applicant applying for order interdicting 1st Respondent from entering its premises without permission and instigating breach of the peace – 1st Respondent raising disputes of fact.

Held: Facts disputed critical to the success of application and cannot be decided on the affidavits.

Held: Application be referred to, oral evidence on those disputed facts.

JUDGEMENT

[1] The Applicant, a company duly incorporated in terms of the company laws of the Kingdom of Eswatini and having its principal place of business at Bhunya in the district of Manzini, approached the court on a certificate of urgency seeking an order in the following terms:

- “1. Dispensing with the requirements of the Rules of Court pertaining to service of process and time limits and permitting this matter to be heard as one of urgency;*
- 2. That the 1st Respondent is interdicted and restrained from:*
 - 2.1 Entering the Applicant’s property without seeking permission from the Applicant’s management.*
 - 2.2 Offering workers on the Applicant’s property money or any form (sic) incentive to join ATUSWA*

2.3 Instigating, promoting, threatening or otherwise causing or engaging in any breach of the peace or acts of violence on the Applicant's property or elsewhere;

- 3. Directing the National Commissioner of Police to ensure that there is adherence to the order of this Honourable Court.*
- 4. The Order issued by this Court operate with interim and immediate effect and that the Respondents show cause on a date to be set by this Honourable Court why orders 2.2, 2.2, 2.3, 2.4 and 3. Above should not be made final.*
- 5. That the 1st Respondent be ordered to pay costs of this application on a punitive scale;*
- 6. Further and/or alternative relief.”*

[2] The Applicant approached the Court on 4th June 2019 alleging that the 1st Respondent, through its officials, had entered the Bhunya Mill Site (Applicant's place of business) without engaging the Applicant and had proceeded to approach individual employees and distribute certain flyers. This was alleged to have occurred on 28th May 2019. It was said that 1st Respondent's agents had opted to leave the premises upon being approached and advised to seek permission to enter the premises.

[3] Applicant further alleges that the 1st Respondent returned to its premises on 29th May, without having engaged it for permission to enter the premises, and proceeded to distribute flyers. On this day, however, it is alleged that 1st Respondent's agents further obstructed the entrance into Applicant's premises, affecting the movement of employees going in and out of the Mill Site and resulting in the disruption of the Saw Mill operations. Again the 1st Respondent's agents were advised to leave the premises and told to contact the Applicant's management if they wished to return and enter the applicant's premises. They left the premises without incident.

[4] It is further alleged that on 31st May, one Wonder Mkhonza of 1st Respondent called the applicant's Human Resources Manager and advised that the 1st Respondent would be coming to the Applicant's premises for purposes of recruiting workers to their Union and that they were not seeking anyone's permission to do that. Indeed the 1st Respondent's agents arrived at the Applicant's premises, placed themselves at the main gate and at a footbridge that provide access to the Mill site and proceeded to obstruct workers who were on their way to the Mill Site. It is alleged that employees were offered E100 by the 1st Respondent's agent to join the 1st Respondent.

[5] During this “recruitment” exercise a fight broke out between the 1st Respondent’s agents and the applicant’s workers, within the Applicant’s premises. Some of the workers apparently objected to the conduct of the 1st Respondent hence the fight. The fight was stopped with the assistance of the police who failed to get an undertaking from the 1st Respondents that it would refrain from disturbing the peace again. 1st Respondent allegedly refused to make such undertaking but instead vowed to return to Applicant’s premises with reinforcements.

[6] The application is opposed and the 1st respondent raised three (3) preliminary points of law namely –

(i) that the applicant had failed to fulfil the requirements for obtaining a final interdict;

(ii) that the applicant had failed to establish a cause of action;

(iii) that there matter could not be decided on affidavits since there existed real and substantial disputes of facts in the matter.

[7] Our view is that the first two points are intertwined with the merits of the matter particularly since the court, on 12th June 2019, granted an interim interdict restraining the 1st Respondent from entering the applicant’s premises without the permission of the Applicant, which interdict was to operate with interim effect pending finalisation of the matter before Court. Consequently, we can only make

the decision as to whether a case has been made for a final interdict upon a consideration of the merits.

[8] On the issue of disputes of facts, the 1st Respondent in its answering affidavit denies the version of events set out by the applicant. They confirm having visited the Applicant's business premises at Bhunya on 27th and 28th May 2019 for purposes of recruiting the employees of the applicant to join ATUSWA. 1st Respondent concedes that on 28th May its agents were advised by the security personnel at the applicant's premises to approach the Human Resources Manager if they sought to recruit members from the applicant's work force. The 1st Respondent avers that its attempt to raise the Human Resources Manager failed as she was said to be out of the office. Even on 31st May the 1st Respondent was unable to speak to the Human Resources Manager as she was said to be out of office. The 1st Respondent's version then differs from that of the Applicant in the following respects:-

- 8.1 1st Respondent avers that its officials travelled to Bhunya at 3pm and upon arrival at the Applicant's place of business, parked their vehicles on the other side of the MR18 public road, away from the Applicant's property;
- 8.2 That they started signing up Applicant's employees who had knocked off work at 3.30pm while they were stationed on the side of the public road, away

from the Applicant's premises. They deny that they caused any obstruction to the Applicant's workforce movement in or out of the Mill Site;

8.3 That they were ambushed by group of twenty (20) people comprising of Applicant's junior managers and security personnel and officials of a trade union/organisation called the Swaziland Economic Improvement Workers Union (SEIWU) who demanded that 1st Respondent's officials leave Bhunya;

8.4 That the SEIWU officials and the Applicant, foreman, one Mr. Ndlovu signed joining forms from the 1st Respondent and proceeded to demand other forms. It is 1st Respondent's assertion that during this demand for the forms and for 1st Respondent to leave Bhunya, its officials were attacked and assaulted by the group. It is alleged that two of the 1st Respondent's officials, including Wonder Mkhonza were hospitalised as a result of the assault.

[9] The 1st Respondent further denies that it gave any of the employees' monetary incentives to join ATUSWA. It specifically denies giving Mr. Bernard Ndlovu E100 and avers that Mr. Ndlovu is not, in any event unionisable because of the position he holds at the Applicant's undertaking. It is alleged that he is a foreman and that he actually led the assault on the 1st Respondent's officials

[10] While the 1st Respondent concedes having refused to make an undertaking to the police and to the Applicant's attorney with regard to future violence and/or violent conduct, the 1st Respondent explains that this was because it had not started or caused the violence and, more importantly, the party that was responsible for the violence SEIWU had not been brought before the police. The 1st Respondent sees itself as a victim of, and not the instigator of the violence that took place on the 31st May 2019. In arguments before court the 1st Respondent indicated that it considered the behaviour of the Royal Eswatini Police of excluding the SEIWU officials from the discussions regarding the assault as well as the Applicant's exclusion of SEIWU from these proceedings as unfair and an indication of favouritism because it considers that the SEIWU was the instigator of the violence.

[11] The above paragraphs represent the disputes of facts as raised by the 1st Respondent in this matter. The 1st Respondent submitted that the Applicant ought to have foreseen that a dispute of facts would arise herein and that the dispute of facts is real and substantial and should result in the application being dismissed as it cannot be resolved on the affidavits.

[12] On the contrary, the Applicant submitted that the dispute of facts raised were neither material nor real. This is premised on the assertion that the 1st

Respondent admits that there was violence at the Applicant's premises and that the officials of the 1st Respondent had entered the premises without permission to distribute flyers.

[13] The Supreme Court, in the case of **E1 RANCH (PTY) LTD V EARLY HARVEST FARMING (PTY)LTD** Appeal Case number 21 of 2017 stated that the court *“has a duty to carefully scrutinize the nature of the dispute with a microscope lens to find out:*
I(i) if the fact being disputed is relevant or material to the issue for determination in the sense that it is so connected to it...that the determination of such an issue is dependent on or influenced by it;”

[14] The Applicant seeks to protect its right to conduct its business at its premises without any unwarranted interference from anyone and without any undue disturbance by anyone. It alleges that these rights have been interfered with by 1st Respondent which not only caused a disturbance at its premises but continued to cause violence. The 1st Respondent denies not only causing violence but causing a disturbance at the Applicant's premises. It alleges that it was attacked by a union active in the Applicant's undertaking outside the Applicant's premises and denies that the fight took place within the premises.

[15] Establishing that the fight took place within the applicant's premises as a matter of fact is critical to the granting or otherwise of the application sought by the applicant. This fact is not an insignificant one but is critical to the determination of the issue before court. Also critical to the issue before court is whether the 1st Respondent was responsible for the violence that took place on the 31st May. The order sought cannot be granted unless these fact are established. It is our view that we cannot come to any finding on the papers. The 1st Respondent raises the issue of preferential treatment being accorded to SEIWU. If that allegation is true then the Applicant would be in contravention of the right to freedom of association by interfering in the functioning of the 1st Respondent. It is important, in our view that the true picture of what occurred on 31st May 2019 be established and for that reason we will not dismiss the application.

We therefore make the following order:

- 1. The matter is referred to oral evidence.**
- 2. Costs will be costs in the cause.**

The members agree.



S. NSIBANDE

PRESIDENT OF THE INDUSTRIAL COURT

For the Applicant: Mr B. Gamedze

For the Respondent: Mr D. Dlamini