IN THE INDUSTRIAL COURT OF APPEAL OF ESWATINI

JUDGMENT

HELD AT MBABANE Case No. 05/2020

In the matter between

JAMES INVESTMENTS
T/A HURLINGHAM ESTATES (PTY) LTD **APPELLANT**

And

SWAZILAND TRANSPORT COMMUNICATION &
ALLIED WORKERS UNION (SWATCAWU) **RESPONDENT**

Neutral Citation: *James Investments t/a Hurlingham Estates (Pty) Ltd v Swaziland Transport Communication & Allied Workers Union (SWATCAWU) (05/20) SZICA 24 [2020].*

Coram: T. Mlangeni, M. Fakudze, D. Tshabalala AJJA

Date Heard: 16 September 2020
Date Delivered: 14 October 2020

Summary: *Labour law: The employer sought a declaratory order before the Industrial Court that the conduct of the members of the union at its undertaking, were in violation of the Recognition Agreement signed by the parties, and further sought withdrawal of Recognition in terms of Section 42(11) of the Industrial Relations Act as amended. The appeal is against dismissal of the application by the court a quo. The Appellant's grounds of appeal on the error of law and fact by the Industrial court's failure to declare the strike unlawful lacked merit in so far as such relief was not prayed for before the court a quo. The appeal also fails wherein relief is sought against the finding of fact by the court a quo, in view of the court's jurisdiction to hear appeals on points of law.*

JUDGMENT

[1] Before this Court is an appeal by the employer against the Industrial Court's judgment dismissing an application for *"withdrawal of Recognition as per Section 42 (11) (b) of the Industrial Relations act 2005 as amended."* In February 2020 the Appellant sought before the Court a *quo*, according to the Notice of Motion, relief couched thus:

1. Declaring the Respondent's conduct to be in violation of the Recognition Agreement signed by the Applicant and the Respondent.

2. *Withdrawal of Recognition as per Section 42 (11 (b) of the Industrial Relations Act 2005 amendment."*

3. *Any further and/or any alternative relief as the above Honourable Court may seem appropriate."*

[2] The relationship between the Appellant and the Respondent was governed by among other instruments, a Recognition Agreement signed by the parties in terms of Section 42 of the Industrial Relations Act (IRA). In terms of the said agreement the Respondent represents employees of the Appellant that are in the bargaining unit.

[3] It is common cause that prior to the Industrial Court decision which gave rise to this appeal the Appellant had brought an urgent application before Acting Judge TL Dlamini which resulted in a consent order for confirmation of an interim order against the Respondent. The said order interdicted the latter's members from acts of *"intimidating and/or threatening violence to non-striking co-employees; from "blocking tractors moving in and out of the Applicant's premises..."*

[4] The Appellant subsequently instituted a fresh application against the Respondent seeking firstly, a declaratory order per the prayers set out in paragraph [1] of this judgment. Noteworthy is that this application was heard and dismissed by another Judge, BW Magagula, sitting with two assessors. The present appeal is taken against the decision of Magagula AJ. The facts

which are mostly undisputed by the Respondent are deposed to by Appellant's director, one Brace James.

[5] By reference to contents of his founding affidavit in the urgent application (Case No. 331/2019) Appellant's director's deposition was that the Respondents failed to adhere or comply with the Industrial Relations Act (IRA) and the Recognition Agreement, namely that the Respondent failed to avail mandatory notice of Intention to Strike in terms of Section 86 (2) and Clause 11.4 of the Recognition Agreement; that the striking workers were blocking or preventing loaders from loading cut sugar cane; and that the 7 non-striking employees were being threatened with violence by the striking workers with the result that these employees who were willing to render their services were hiding in fear inside the workshop. This is the conduct the Appellant asserts is in violation of the Recognition Agreement entitling it to cancel the agreement. It is the same conduct that the Appellant sought before Magagula AJ to be declared as violation of the said agreement, giving it the right to seek its cancellation.

[6] The following are the grounds of appeal:

1. *The Court erred in fact and in law in that it failed to find that the Respondent and its members had embarked on an unlawful strike which was not in compliance with Part 8 of the Industrial Relations Act and thereby breached the Recognition Agreement.*

1.1As a consequence, ...the Court failed to properly apply the legal principles of the common law of contract in particular that the breach of the Recognition Agreement by the Respondent entitled the Applicant to ... approach the Court for cancellation in terms of clause 17.2 thereof.

1.2 In consequence also of the Court's aforesaid error the Court failed to give due regard and meaning to Section 43 (11) (b) of the Industrial Relations Act as amended and effectively allowed the Respondent trade union to breach the pre-strike procedures set out in Part 8 of the Industrial Relations Act and therefore the Recognition Agreement with impunity...

2. *The Court erred in fact in finding that the Applicant had pleaded insufficient facts in support of its allegation of intimidation of workers who wished to work, and its allegations of breach of Respondent's members duty to carry-out agreed duties ... during the strike action on the contrary it was the Respondent's members that had engaged in acts of intimidation and breached the Recognition Agreement by failing to complete agreed tasks before embarking on a strike action. Alternatively, referred the matter to oral evidence in the event it recognised the Respondent's denial as giving rise to a dispute of fact which ... would be a material dispute of fact ... the Honourable Court exercised its discretion injudicially in that public policy requires that the scourge of violence during industrial action not be allowed ... with impunity and without consequences.*

3. *The error in law by failing to apply the common law principles of contract and the provisions of the Recognition Agreement relating to the right of*

the Appellant to the remedy [of] the breach of the Agreement by cancellation, and wrongly treated it as a matter of discretion.

4. *The Court erred in finding that the Appellant had resorted to self-help by declining to enter into collective bargaining negotiations pending the outcome of the Court application. Even though the issue was raised on papers, the Respondent never pursued [it] at the hearing of the matter at the Court's a quo.*

   4.1 *The Court... in any event fell short of finding that the Appellant acted in bad faith and did not uphold or find that the Appellant had approached the court with unclean hands and therefore not entitled to a remedy."*

[7] The evidence in support of prayers for declaratory and cancellation order[1] are found in Mr James Bruce's founding affidavits in both case numbers 16/2020 and 331/2019.[2] The latter affidavit is more detailed than the former on the alleged acts of breach.

[8] The evidence presented by the Appellant before the Court a quo can be summarized thus: on the 24 October 2019 the Appellant's director noticed from early morning that the employees were not at work and that the strike had commenced. On the same day he received via email a strike notice letter advising that industrial action was to commence on the 24 October 2019.

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[1] Declaration of Respondent's members conduct as constituting breach of the Recognition Agreement and Cancellation of the Recognition Agreement, respectively.

[2] Per the incorporation of the latter as part of the former,

[9] Prior to that, in July 2019 the Appellant had received a report of dispute, which dispute was subsequently conciliated by Conciliation Mediation and Arbitration Commission (CMAC) on the 7th October, 2019 with no agreement reached. A certificate of unresolved dispute was issued. Subsequently on the 18 October 2019 a balloting exercise was conducted with the outcome that out of 52 employees of the Appellant's undertaking, 44 voted in favour of strike action.

Notice of strike action.

[10] The Appellant alleges that the strike action was in violation of Section 86 (2) and Clause 11.4 of the Agreement, both of which require that a written Notice of strike action be served on the employer or association and the commissioner of labour. It is alleged that the industrial action commenced without the required 7 days written Notice. However, the Respondent refutes that allegation and asserts in its Answering affidavit that pre-strike processes were followed prior to embarking on the industrial action on the 24 October 2019. It is averred in the Answering affidavit that the strike was lawful and that notices were issued appropriately.

Alleged obstruction and threats of violence to non-strikers

[11] It is alleged on behalf of the Appellant that the striking employees blocked and prevented loading of cut sugar cane.

[12] It is further alleged that 7 employees who elected not to participate in the strike were threatened with violence by the striking workers, resulting in the former not rendering service as they had to go into hiding due to fear.

Grounds of appeal and judgment of the Court a quo

[13] It is noted that in dealing with the issues the Court a quo declined to adopt a narrow legalistic approach. Instead it adopted a broader approach bringing to bear the mandate of the Court conferred by the Industrial Relations Act Section 5(4) *to make orders it may deem reasonable which will promote the objects of the Industrial Relations Act to secure and maintain good industrial and employment relation.*[3]

[14] *Ground No. 1*: **Error in fact and in law in that the Court failed to find there was unlawful strike.** In drilling deeper into the alleged conduct by the Respondent,[4] the Industrial Court noted that the argument of the Appellant concerning acts of intimidation and threats of violence was that the union failed to prevent intimidation of non-striking workers into participating in a strike. The Court appreciated that the relevant part of Clause 3.5 of the Recognition Agreement states that it was the Union's undertaking "... *to prevent the victimization of any non-member or member from performing their duties.*" Clause 11.6 records the recognition by the Respondent Union "... *the right of members of staff, non-members of the union and any members of the bargaining unit who wish to do so to continue about their normal duties during any industrial action.*" The union further agrees in terms of Clause 11.8 "...*that there will be no interference with or intimidation of any other employees concerned who do not wish to join the strike.*" Clause 12.1

[3] See pages 20-21 of the judgment.

[4] Articulated at para 15.3 of Appellant's founding affidavit.

captures the undertaking of responsibilities by both parties to the agreement *"...both the union and the company recognise their responsibilities sand agree in the interest of good relation that any victimization or intimidation must be prohibited."* The Court a *quo* further noted the import of Clause 12.2 which provides for action to be taken by the parties in the event of the occurrence of victimization, that *" ... both parties shall take all reasonable steps to ensure that it [victimizing/intimidation] is stopped immediately."*

[15] The Court a quo opined that the Appellant acted reasonably in terms of the said Clause 12.2 by keeping under key and lock the threatened employees for their safety.

Whether the strike was unlawful

[16] The Court *a quo* did not venture to decide whether the 25 October strike which was apparently the subject of prayer for interdict in Case no. 331/2019, was lawful or otherwise. This was not one of the reliefs sought before Magagula AJ, hence the learned Acting Judge expressed regret that the Court that was seized with the matter[5] *"...never pronounced on the legality or otherwise of the strike, because the parties* subsequently *entered into a consent order."* Having said that, the Court *a quo* further stated that the pronouncement[6] or lack of it was not relevant for the Court to decide on the specific conduct

[5] In Case No. 331/2019)

[6] Pronouncement on the legality or otherwise of the strike.

complained of, advanced as the ground for withdrawal of recognition of the Respondent.

[17] The Respondent in its denial that the strike was illegal also pointed out that there was no judicial finding made by any Court that the said strike action was illegal. The issue is further compounded by the fact that the consent order granted under Case No. 331/2019 neither interdicts the strike nor makes any declaration concerning its illegality. The order only interdicts members of the Respondent who are engaged in the strike action from intimidating and or threatening violence to the employees who are not engaged in the strikes as well as interdicts them from blocking tractors from transporting sugar cane.

[18] The Appellant's ground of appeal No. 1 that the Court a quo erred in fact and law in failing to find that the Respondent and its members' strike was unlawful has no basis as the Court *a quo* was not called upon to grant such relief in the first place. The Notice of Motion contains three prayers: *Declaration of Respondent's conduct to be in violation of Recognition Agreement; withdrawal of Recognition; Any further and/or any alternative relief.*[7] The principle that the Court may not grant relief not prayed for has relevance in this instance.

[7] It was noted during preparation of this judgment that the 3rd prayer was numbered as 6, suggesting that there were prayers 4 – 5 missing in between. The Registrar's advice on our inquiry was that, that was just an error in the numbering and that she had assurance from the Appellant's counsel that the Notice of Motion indeed contained only the three prayers it reflects.

[19] *Ground of appeal No. 2* – **that the Court erred in fact in finding that the Applicant had pleaded insufficient facts in support of allegations of intimidation of workers who wished to work, and of breach of Respondent's members' duty to perform agreed tasks during strike action. That on the contrary it was the Respondent who raised bare denials.**

[20] The Court a quo analysed the evidence presented by the Appellant on affidavit and came to a conclusion that it fell short of convincing the Court to grant the relief sought. It is difficult for this Court sitting on appeal to lightly temper with factual findings of a trial Court. It is alleged without substantiation that the Court *a quo* failed to exercise its discretion judiciously when it did not refer the matter to trial to deal with disputes of fact. There is no basis for this court to venture beyond the jurisdiction conferred on it by Section 19 (1) of the IRA, to hear and decide appeals on questions of law. As Counsel for the Respondent rightly argued, the wording of Section 19 (1) is clear and unambiguous on the issues that may be determined by the Court on appeal.

[21] The Court *a quo* articulated its view clearly that it did not countenance acts of violence that taint the exercise of a right to strike. The Court *a quo* then pointed out the gaps in the Appellant's evidence which it found to be lacking in specific relevant facts to substantiate and support the drastic relief sought, to cancel Recognition of the Respondent as representative of unionisable employees at Appellant's undertaking. In my view the Court *a quo* cannot be faulted on its analysis of the evidence and its finding that it was insufficient in the circumstances.

[22] *Appeal ground No. 3* **that the Court erred in its finding that the Appellant resorted to self-help by declining to enter into collective bargaining negotiations.** The Court a quo correctly in my view found that the Appellant's attempt in its reply to distinguish a collective bargaining agreement from a recognition agreement as separate documents is not sustainable as the two are connected.

[23] The Court *a quo* correctly and logically so, found that the Appellant's suspension or putting on hold any discussion relating to collective bargaining agreement was unilateral and tantamount to self-help.

[24] The Court *a quo* analysed the requirements for declarators in general and for the relief sought in this matter. The Court then concluded that the Appellant had not satisfied the requirements for the Court to exercise its discretion in its favour. The Court cited both local and regional authorities on this issue. The court followed the decision in *Nokthula Makhanya & 3 others*[8] and came to the conclusion that despite the clear right shown, on the other hand the Appellant failed to make a case to warrant the court to exercise its discretion in its favour. There are no grounds for this Court to temper with that conclusion.

[8] Civ Appeal case No. 23/2006.

[25] Finally the Court a quo summarized its decision to dismiss the application for cancellation of the agreement by reference to the Court's mandate under the IRA, whose objects are to secure and maintain sound industrial and employment relations in the country. The Court a quo emphasized the importance of collective agreements for employer employee relations in the workplace and that they may not be lightly discarded. Indeed, it is in favour of public policy that termination of such agreement should be a last resort after interventions envisioned by the law to resolve problems have been engaged.

[26] From the foregoing, the Industrial Court's decision is upheld and the appeal dismissed.

There is no order as to costs.

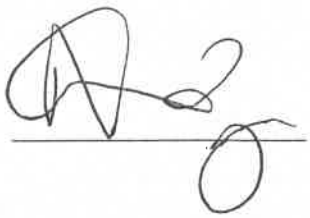
D. Tshabalala
Acting Judge
Industrial Court of Appeal

I agree

T. Mlangeni
Acting Judge
Industrial Court of Appeal

I agree

M Fakudze
Acting Judge
Industrial Court of Appeal



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