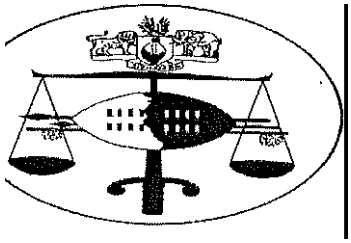

IN THE INDUSTRIAL COURT OF SWAZILAND

Case No 317/2021

In the matter between:

PIGGS PEAK HOTEL & CASINO Applicant

And

SWAZILAND HOTEL AND CATERING ALLIED WORKERS UNION 1st Respondent

EMPLOYEES OF THE APPLICANT WHO ARE IN THE UNIONISABLE CATERGORY AND INTENDING TO PARTAKING THE STRIKE ACTION Further Respondent

Neutral citation: Piggs Peak Hotel & Casino v Swaziland Hotel and Catering Allied Workers Union & Another [317/21) [2021] SZIC 96 (01 December, 2021)

Coram: **NGCAMPHALALA AJ**
(Sitting with Mr. EL.B. Dlamini and Mr. M P. Dlamini, Nominated Members of the Court)

DATE HEARD: 23rd November, 2021

DATE DELIVERED: 01'1 December, 2021

SUMMARY: ***The Applicants instituted the present application on an urgent basis-Section 86 (8) of the Industrial Relations Act 2000 (as amended) Application seeks to restrain Respondents members from participating in strike action.***

Held - ***Application granted. Respondent has failed to comply with Section 86 (8) of the Industrial Relations Act 2000 (as amended).***

JUDGMENT

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[1] The Applicant is Piggs Peak Hotel and Casino, a Hotelier and/or providing hospitality services, like services and casino, having its principal place of business at Piggs Peak area, along King Mswati II, highway, in the Northe111 district ofHhohho.

[2] The 1st Respondent is Swaziland Hotel and Catering Allied Workers Union, a trade union duly registered in accordance with the Industrial Relations Act and recognized by the Applicant having its principal place of business at P.O Box 236, eZulwini, district of Hhohho, c/o Piggs Peak Branch, Piggs Peak, District ofHhohho.

[3] BRIEF BACKGROUND

The present proceedings seek to interdict and prohibit the Respondent and its members from proceeding with a strike action, that was scheduled to

commence on the 5th November, 2021. The Applicant is a hotel in Piggs Peak and operates twenty-four (24) hours. During such periods, the Applicant operates a four shifts a day, commencing at 06:00hrs to 15:00hrs, 08:00hrs to 17:00hrs, 15:00hrs to 00:00hrs and 11:00hrs to 08:00hrs.

[4] On Wednesday the 3rd of November, 2021 at 08:06am the Applicant received a notice from the Respondent indicating that its members intended to proceed with a strike action, on Friday the 5th November, 2021. Applicant states that the notice did not stipulate the reasons for the strike action, nor did it indicate the time for the commencement of the strike action. The Applicant submits that ancillary from the other multiple procedural defects, the strike is unlawful for reasons that the dispute as reported by the Respondent at **Conciliation Mediation Arbitration Commission (CMAC),** contains items that constitute disputes of right as opposed to those of interest. The strike contravenes the Covid Regulations, and further has failed to adhere to the procedural pre-conditions set out in **Section 86 of the Industrial Relations Act 2000 (as amended) (IRA).** It is on the basis of the above that the Applicant instituted the present proceedings against the Respondent.

[5] The Applicant has approached the Court under a certificate of Urgency, seeking an order in the following terms:

5.1 That the rules relating to form, service, notice and time periods be dispensed with and this application be heard as an urgent application as provided for in Rule 25(6) of this Honourable Court.

5.2 Condoning the Applicant's non -compliance with the said rules of court permitting this matter to be heard as one of urgency.

5.3 That a rule nisi do hereby issue calling upon the Respondent to show cause on a date to be determined by this Honourable Couit why the following orders should not be made final:

5.4 That the Respondent and its members be interdicted and prohibited from proceeding with a strike action that is scheduled to commence on the 5th November, 2021;

5.5 That the strike action that has been conceived by the Respondent be declared unlawful, invalid and irregular.

5.6 Directing that prayers 5.4 and 5.5 above operate with immediate and interim effect returnable on a date to be determined by this Honourable Court or pending the finalization of this matter.

5.7 Cost of suit in the event of unsuccessful opposition.

5.8 Further and/or alternative relief.

[6] The Applicant's Application is opposed by the Respondent and an Answering Affidavit was duly filed and deposed thereto by the Respondents

National Executive member, and Chairperson, Mr. Bheki Dlamini. The Applicant thereafter filed its Replying Affidavit.

[7] The matter came before Court on the 4th November, 2021, wherein the parties agreed to an interim order being granted in terms of prayer 3 and 3.1. The matter was postponed to the 12th November, wherein the parties had agreed to argue the matter, however, the matter did not proceed as pleadings had not been completely filed in the matter. Again, the matter was postponed to the 19th November, 2021 on which day the Respondent was not ready to proceed with the matter, the matter was eventually argued on the 23rd November, 2021.

ANALYSIS OF FACTS AND APPLICABLE LAW

[8] First to address the Court was Mr. Magagula on behalf of the Applicant, he informed the Court that he would use a three-point approach to deal with the Notice to strike in terms of **Section 86(8).** It was his argument that the Applicant is in the Hotel Service and Hospitality operating on a twenty four-hour shift system. It was his submission that it was common cause that the Applicant and the Respondent had reached a deadlock, and the Respondent and its members now intended to engage in a strike action.

[9] He stated that before any party can embark on a strike action substantive consideration must be taken into regard in particular **Section 86(8)** which speaks to the Notice before a strike action. It was his argument that the notice that is given in terms of this section is not a mere notice, however

such notice must provide the issues that are the subject of the strike and the timelines in which the action is to commence. I must at this juncture state that, the Respondent's attorney Mr. Hlophe assisted the Court that in the amendments of the **Industrial Relations Act, 2010, section 86(7)** was renumbered and it is now **Section 86(8)** therefore **Section86** (7) now reads .**Section 86(8),**

[10] It was his submission that the Notice in terms of **Section 86(8)** allows the employer to put into place safety measures during the period of the strike. He further stated that on close inspection of the section it goes beyond the mere reading of the Act. Mr. Magagula then referred the Court to paragraph 6.2 and 6.4 of the Applicants heads of argument, where he had cited the case of **CERAMIC INDUSTRIES PTY LTD T/A SANITARY WARE V NATIONAL CONSTRUCTION BUILDING AND ALLIED WORl(ERS UNION (1997) 18 ILJ 671 (LAC),** where the Court delt with **Section 64(1) (b) of the South African Labour Relations Act** which is equivalent to **Section 86(8) of the Industrial Relations Act 2000 (as amended).**

[11] He further cited the case of **UBOMBO SUGAR LIMITED V SWAZILAND AGRICULTURAL PLANTATION UNION INDUSTRIAL COURT NO. 245/2021,** m paragraph 10.2 of the judgment the learned Judge Thwala stated:

"The view taken by this court is actually the opposite, viz; that the notice given must not only be in writing but that it must proceed to state the specific date and time for the commencement of the strike, which must be at least 48hrs from the strike commencement. Indeed, this is in accord with the laws of metaphysics which the Legislature expressly adopted in respect of Section 86(7) of the Industrial Relations Act."

[12] It was the Applicants further argument that the Notice given to it by the Respondent on the 3rd November, 2021, did not give the Applicant the required forty-eight-hour notice, and as a consequence of this the intended strike action is therefore rendered unlawful. It was the Applicants averment that the case of Ubombo Sugar was similar to the case before Court, as the judgment deals with the core issue before the Court which is the notice to strike in terms of **Section 86(8) of the Act.**

[13] The Respondent in response to the pt point argued by the Applicant submitted, that the basis of Applicants argument was premised on the case of **Ubombo Sugar v Swaziland Agricultural Plantation Union,** which he argued was premised on **Section 64(1) (b)** of the **South African Labour Act,** which reads;

"Every employee has the right to strike and every employer has recourse to lock out ...

b) In the case of a proposed strike, at least 48hrs notice of the commencement of the strike, in writing, has been given to the employer, unless ... "

[14] The Respondent then cited **Section 86(8) of the Industrial Relations Act**

"For a strike action to be lawful under sub section (b) a new notice shall be given by the party intending to engage on a strike action to the other party or parties to the dispute and to the office of the Commissioner of Labour and Commission at least forty-eight (48) hours before commencement of such action"

[15] Respondent argued that even though there are similarities to **section 86(8)** of the **Industrial Relations Act and Section 64(1)(b) of the South African Labour Act** there is a fundamental difference in the two pieces of legislation when it comes to lawful legal strike actions: Respondent submitted that the purpose of a notice is to warn the employer of an impending strike, so that the employer can prepare for a strike action that is intended, or to afford the employer an opportunity to accede to the employees' demands in order to avoid the strike action, it serves as a cooling off period.

[16] It was the Respondents averment that the difference between the two jurisdictions labour laws when it comes to strike actions, is that there is only one strike notice that is issued before the commencement of a strike in terms of **section 64** of the Act. It was his submission that as soon as the employer and employee reached a deadlock the employee may immediately issue a strike notice. Whilst the **Industrial Relation Act** requires that two notices be given before a strike action may commence. It was Mr. Hlophe's argument that, when the parties reached a deadlock, firstly the matter must

be taken to **CMAC** for conciliation, if conciliation/ negotiations fail a certificate is issued. This is then followed by the first notice which is served on the Labour Commissioner and Commission, and the employer in the present case. The Commission is then required to atTange and supervise a balloting exercise, which if it favors for a strike action, will then be followed by the second notice to strike, which will stipulate that the intended strike action will proceed after the forty-eight-hour notice.

[17] It was his argument that the position as articulated in the Ubombo case, is that the notice should not only be in writing, but it must proceed and state the specific date and time for the strike action. It was his averment that this position applies rightfully in the South African jurisdiction as the only time the employer becomes aware of the strike action is through the one notice. Thus, the notice should contain the issues in dispute and the time for the commencement of the strike action. Whilst within our jurisdiction, Mr. Hlophe argued that the structuring of our laws, afford the employer conciliation, balloting and two strike notices. Therefore, the notice in terms of **section 86(8)** does not require the specific issues, date and time of the commencement of the strike action. This is because of the structure of our Legislation, which gives the employer two strike notices, upon the issuance of the second-strike notice, the employer is already privy to the issues in dispute. It was his submission that the Court in Ubombo Plantation used the principle as applied in **Ceramic Industries t/a Betta Sanitary Ware (Supra),** which applies in the South African jurisdiction, but cannot be rightly applied in Eswatini as the structure of the legislation governing strike actions is not the same.

[18] Mr. Hlophe proceeded to cite **Section 87(1),** which section states that a protected strike means a strike that complies with the provisions Act, and **Section 88** which gives exclusive jurisdiction to the Comt, in matters involving aggrieved parties relating to strike actions and lockouts.

[19] It was his argument that **Section 86(8)** does not provide for issues to be detailed and time and date to be stipulated in a strike notice. Therefore, the Respondent has complied with the provisions of **Section 86(8)** as it has provided the second notice to the Applicant giving the Applicant 48 hrs. notice of its intended strike action. The strike in itself is lawful in terms of the provision of the **Industrial Relations Act.** In closing of this point, the Respondent urged the Court to disregard the case of Ubombo Sugar, and further submitted that it is no1mal and acceptable that a Court co1Tect its own judgment.

[20] In terms of the **Black's Law Dictionary 8th Ed,** Notice is held to mean "A *legal notification or warning that is delivered in a written format or through a formal announcement.* "

It is common cause between the parties that the strike notice in terms of section 86(8) should be in writing, the issue in dispute is the existence of a legal obligation in terms of **section 86(8)** for the notice to mention the date, time of commencement and issues in dispute. Conradie J in **METAL ELECTRICAL WORKERS. UNION OF S.A V NATIONAL**

PANASONIC CO (1991) 12 ILJ 533 (c) refers to a strike action as *"a power struggle between employee and employer in the workplace as a boxing match. Once parties' resort to industrial action they are given boxing gloves to engage in a boxing match with the aim of inflicting as much pain on the other as possible. The sole aim of this contest is to bring the other party to submission by exerting as much economic power on the other as possible.* "

[21] Conradie J also correctly points out that there are rules to be observed and that the Court, who acts as a referee in labour disputes will as a rule not intervene and will only do so in limited circumstances. The pre-condition for entering the boxing arena is compliance with the procedural requirements of **Section 64(1) of the South African Labour Relations Act (LRA),** in our case **Section 86(8) of the Industrial Relations Act.** Where one of the parties have not complied with the procedural requirements the strike action will be unlawful and the court will as referee intervene. This is exactly what the Applicant in this case is asking the Court to do.

[22] It appears from the reading of **Section 86(8)** of the **Industrial Relations Act** and **Section 64(1) Labour Relations Act** that the provisions are virtually identical, aimed at reaching the same goal, prior notification of a strike action. Even though the Court appreciates the argument of Mr. Hlophe that the two legislations are not structured in a similar manner, the Court cannot lose sight of the reason why the strike notice is given. It must be stressed that the requirements of giving prior notice of a strike or lockout, is not merely a functionary procedural step that an employee or a

union should mechanically comply with in order to acquire the license to embark on a strike action.

[23] It is patently clear that the strike notice has a specific purpose and that it is in light of that purpose that every strike notice must be considered. This is in line with the approach followed by this Court, in terms of effect, ambit and content of a legislative provision should be understood and interpreted, bearing in mind the statutory context of such a provision. In interpreting a provision of the **Industrial Relations Act** this Court should be mindful of the primary object the Act, as set out in section 4 of the Act, which is to;

" (a) promote harmonious industrial relations; (b) promote fairness and equity in labour relations; (c) promote freedom of association and expression in labour relations; (d) provide mechanisms and procedurec;for speedy resolution of conflicts in labour relations; (e) protect the right to collective bargaining; (f) provide a healthy and legally sound environment for the creation of smart partnerships between the government, labour and capital; (g) promote and create employment and investment; (h) stimulate economic growth, development and competitiveness; (i) stimulate a self regulatory system of industrial and labour relations and self-governance;

0) ensure adherence to international labour standards; and (le) provide a friendly environment for both small and big business development.

[24] **Section (2)** any person applying or interpreting any provision of this Act, shall take into account and give meaning and effect to the purpose and

objective, referred to in subsection (1) and to the other provisions of this Act.

[25] **Zondo JP** states the following with reference to the interpretation approach in the case of **EQUITY AVIATION SERVICES (PTY) V S.A TRANSPORT & ALLIED WORKERS UNION & OTHERS (2009) 30 ILJ 1997 (LAC),**

"In my view, this approach needs some refinement. Interpretation must always begin with the words employed in the statute. Indeed, the very purpose of the traditional rules of statut01y interpretation was to attempt to control the context of the words which were so employed by the legislature. The golden rule of interpretation, for example, attempted to restrict meaning to the 'ordinary meaning' of the words employed in the provision and authorized a departure under very strict circumstances. Further, this aim was pursued by restricting the sources of meaning, that is to restrict the range of resources which the interpreter could access so as to gain meaning to the context of the words so employed; that is, the long title, the preamble and the headings were regarded as permissible aids to construction but then only in the case of ambiguity. In this way, courts attempted to attain closure of the text by producing a result which reflected only one statutory message. [185] With the advent of constitutional democracy, the responsibility of the statutory interpreter became more complex. A broader contextual approach was mandated. Context had to include core constitutional values, the historical background of the statute, its pu,pose mediated through the aims of the Constitution as well as the

relevant social, political and economic context and, where necessary, international law. But this approach does not mean that the words of the statute can be ignored. "

[26) It is in light of this interpretative context that the strike action / lock out notice must be examined. The Court has already pointed out that the issuance of a strike notice is not merely a procedural step that must be mechanically adhered to. The Courts have interpreted what the purpose of the notice is. It is accepted that the purpose of such a strike;

"Is to warn the employer of collective action, in the form of a strike, and when it is *going to happen so that the employer may deal with that situation.* "

The above seems to indicate that the legal position is that the intent of a strike notice is of critical importance. The employer depends largely on the contents of the notice to make important decisions in relation to the strike action. It determines whether he is going to accede to the Unions demands, or whether he will put in place temporary placements for the duration of the action to minimize the impact of the strike on the business.

[27] The Court therefore concurs with the position taken by Judge Thwala in the matter of Ubombo Sugar. The strike notice therefore, does not comply with **Section 86(8) of the Industrial Relations Act.**

[28] The second argument brought by the Applicant pertained to the report of dispute, which the Applicant avers covers multiple issues. It was Mr.

Magagula's argument that the issues, are issues of right and not of interest, which issues are not ones that can be remedied by way of strike action. It was his argument that strike actions can be taken in respect of disputes that have been certified as unresolved, and referred the Court to **Section 86(1) (a) of the Industrial Relations Act.**

[29] He went on to argue that having satisfied this Section, the next limitation on the right to strike is a substantive limitation premised on whether there is a dispute of right or dispute of interest. Applicant averred that the substantive limitation which is statutory in nature as envisaged by **Section 85(2)** of the Act, states that if the dispute is one of right, then the matter must be referred to adjudication either in the Courts or arbitration.

[30] The mere fact that a dispute has been certified as unresolved does not automatically trigger the right to strike. the nature of the dispute needs to be carefully examined to determine whether the dispute is one of interest or right. It 'was Applicant's argi:iment that in the present matter," the Respondent has included issues which do not fall within the basket of dispute of interest, which is the 13th Cheque issue and the Christmas Vouchers. The Applicant cited the case of **NEDBANK SWAZILAND LIMITED V SWAZILAND UNION OF FINANCIAL INSTITUTION AND ALLIED WORl(ERS UNION IC OF APPEAL CASE NO. 11/2006 and TIMOTHY VILAKATI V LIDWALA INSURANCE (300/2017) (2018) SZIC 37.**

[31] Applicant argued that the rationale of the quoted authorities is that once a strike notice is taunted with issues which are not resolved by way of a strike action, the intended strike becomes unlawful. Applicant submitted that even if the issues which are raised as being part of the intended strike were not objected to at **CMAC** or during the balloting process. On that premise it was its argument that the intended strike action is unlawful as issues of the 13th Cheque and Christmas vouchers are not competent disputes for which the employees can proceed to strike.

[32] In rebuttal of this argument the Respondent referred the Court to paragraph 27 of its Affidavit and paragraph 22 of the Applicants founding Affidavit, where it became apparent that the issue of the Christmas Vouchers had been settled through negotiations, and agreed upon, leaving only the issue of the 13th Cheque. The Respondent went further to argue that the issues were subject of negotiating between the Applicant and the Respondent, hence the reason, Applicant did not object to the report of dispute and further did not raise an objection to the two issues being included in the dispute at **CMAC.** At all material times the Applicant was aware that the disputed issues were not ones of interest.

[33] Respondent referred the Court to the case of **CERAMIC INDUSTRIES LTD T/A BETTA SANITARY WARE V NATIONAL CONSTRUCTION BUILDING & ALLIED WORKERS UNION** & **OTHERS 11 (1997) 18 ILJ 716 (LC).** It was Mr. Hlophe's further argument that the case of **NEDBANK SWAZILAND V SUFIA W** as cited by the Applicant is distinguishable to the resent case, in that the Respondent had included grievances of employees, who were not part and parcel of the

bargaining unit. The Court as a result should disregard the Applicants line of argument.

[34] The Court's view on this issue is aligned to the argument of Mr. Hlophe and the Ceramic Industries judgment;

"The argument would seem to me that if there is one bad apple in the barrel all the apples including the goods ones should be thrown out. I do not think this is what was intended. This would be far too technical. the proper approach appears to be to rely on the test of severability. Can the demand for the dismissal of the three managerial employees stand alone? In my opinion it can and therefore the strike is permissible on this ground. "

(35] The severability clause finds its basis from the blue-pencil doctrine or blue - pencil test, which means to delete the invalid (unenforceable) words of a part of a contractual provision to keep the other part of such provision validated and thus enforceable. Resultingly the valid part of a provision is enforceable without the need to invalidate the complete provision solely owing to a certain invalid part.

[36] From the evidence adduced it is evident that the Applicant was aware of all the issues as conciliated upon at **CMAC.** The Applicant had a platform to raise the argument that two of the issues raised by the Respondent were not issues of interest, but failed to do so during the conciliation, and during the balloting exercise. It seems the point now is being raised as an afterthought in an attempt to stop the Respondent from embarking on a strike action. The Court is of the view that one apple cannot taint the whole barrel. It is

evident that the issue of the Christmas vouchers was resolved, and that the only issue remaining is the issue of the 13th Cheque, the question therefore is, can the remaining issues stand on their own? The answer is yes, therefore the strike is permissible on those grounds.

[37) The last two points as argued by Mr. Magagula pertained to mala fides and non-compliance with the Covid Regulations. The Court will not deal with these issues as they do not go to the crux of the matter. The issue of Covid 19 deals with logistical issues that the Court will not adjudicate upon. Therefore, the Court will say no more on these two heads.

[38] In light of the above finding of this Comt, the Court makes the following order;

l) The strike notice by the Respondent issued on the 3rd November, 2021 constitutes an unlawful strike notice.

2) The Respondent is interdicted from continuing with the strike action.

3) There is no order as to costs.

ne Members Agree.

B. NGCAMPHALALA

ACTING JUDGE OF THE INDUSTRIAL COURT OF SWAZILAND

FOR APPLICANT: Mr. H. Magagula (Robinson Bertram).

FOR RESPONDENT: Mr. M. Hlophe
(M. Hlophe & Associates)