IN THE INDUSTRIAL COURT OF ESWATINI

HELD AT MBABANE Case No.345/2021

In the matter between:

NATIONAL PUBLIC SERVICE AND ALLIED WORiillRS UNION OBO NKOSINATHI MAGAGULA & 13 OTHERS Applicants

And

THE EXECUTIVE SECRETARY CIVIL SERVICE COMMISSION 1st Respondent

THE PRINCIPAL SECRETARY MINISTRY OF PUBLIC SERVICE 2nd Respondent

THE PRINCIPAL SECRETARY MINISTRY OF AGRICULTURE 3'd

THE ATTORNEY GENERAL N.O. Respondent 4th

Respondent

Neutral Citation: National Public Service And Allied Workers Union obo Nkosinathi Magagula and 13 Others vs. The Executive Secretary Civil Service Commission and 3 Others (345/2021) [2022] SZIC 17 (08 March 2022)

Coram: **V.Z. Dlamini - Acting Judge**
Sitting ·with D. Mmango and MT E Mtetwa - Nominated

*Member
s of the
Court)*

LAST HEARD: 12 January 2022

DELIVERED: 08 March 2022

SUMMARY: *Applicants instituted an urgent application against the Respondents seeking an order for reinstatement of their fit!! salary on the basis that the stoppage of their salaries or portion thereof was unilaterally implemented by a fimctionary that lacked the statutory power to do so.*

HELD: *The Respondents' omission to file Answering Affidavits means the Applicants' version remains uncontroverted. As salary stoppage not sanctioned by appropriate authority it is legally untenable. Moreover, since the Applicants tender services, the 'no work, no pay' rule does not apply.*

JUDGEMENT

INTRODUCTION

[l] The Applicant, a trade union, instituted an urgent application on the 6th December 2021 on behalf of its members (Further Applicants) who are employed by the Respondents as Stockmen also referred to as Herdsmen and based at Nkalashane Farm (Sisa Ranch). The following orders are sought by the Applicants:

"]. Dispensing with the usual forms and procedures as relates to the time limits and service;

2. *Condoning Applicant's non-compliance with rules of this Honourable Court;*

3. *A Rule Nisi do hereby issue calling upon the Respondents to show cause why the following orders should not be made final:*

   3.1 *Interdicting the Respondents forthwith from the continued withholding of the whole salary or portion of the salary of the Applicant's members based at Nkalashane Farm pending final determination of this Application.*

4. *Prayers 1, 2, 3 and 3.1 be granted with immediate interim effect and be returnable on a date determined by the court.*

5. *Directing the Respondents to reinstate and or restore the full salary of the Respondents [Applicants]forthwithfrom the date of the order or judgment of the court.*

6. *Costs of the Application in the event of opposition.*

7. *Further and/or alternative relief*

BACKGROUND

[2] The facts are common cause. The Further Applicants' duties entail herding cattle, which require them to walk on bushy and thorny areas and trenches in the veld where they risk encountering snakes, scorpions and spiders. At the beginning of 2021, the Further Applicants requested protective

clothing

(PPE) from the 3rd Respondent since it was the latter's obligation to supply them with PPE. Around April 2021, the 3rd Respondent distributed two piece overalls to the Further Applicants, but without water boots.

[3] A dispute ensued following the 3rd Respondent's failure to provide the Further Applicants the water boots; the employees complained that the PPE was inadequate given the hazardous environment they had to navigate. In July 2021, the 3rd Respondent threatened a complete stoppage of payment of the Further Applicants' salaries following that the intermittent *"no work, no pay"* effected for their abandonment of work had failed to discourage them from the stance they took in protest of inadequate PPE.

[4] Pursuant to the aforementioned threat, the Applicants filed an urgent application on 17th August 2021 under case no. **228/21** in which they sought to interdict the same Respondents (Civil Service Commission and Ministry of Public Service) from implementing a recommendation made by the Ministry of Agriculture for the unilateral stoppage of the Fmiher Applicants' salaries. In response to that Application, the Respondents contended that the Applicants were not entitled to the order because the CSC had not adopted the recommendation.

APPLICANT'S CASE

[5] While the Application under case no. **228/21** was pending hearing by the

Court, the Applicants launched the present Application alleging that the 2nd

and 3rd Respondents had indeed stopped payment of the Further Applicants' salaries despite lacking an instrument from the 1st Respondent authorizing that measure. Moreover, the Applicants contend that the salary stoppage was unilateral and unlawful for the following reasons:

5.1 Further Applicants were never consulted prior to the interdiction of their salaries;

5.2 Further Applicants were never found guilty of any misconduct warranting the stoppage of salaries;

5.3 Further Applicants have not been found by any Court to have unlawfully engaged in a work stoppage or unlawful industrial action;

5.4 The salary stoppage amounted to a repudiation of the Further Applicants' employment contracts.

RESPONDENT'S CASE

[6) The Respondents met the Applicants' motion by filing Replies as opposed to Answering Affidavits and raised a point of law as well as responded to the merits. It is contended by the Respondents that the Applicants have approached the Court with di1iy hands since the Fmiher Applicants have boycotted their duties in April 2021 without notice or engagement of the

3rd Respondent and this boycott has persisted for eight months with the employees ignoring legally available remedies to resolve the dispute.

[7] Fmihermore, the Respondents argued that the Further Applicants' work stoppage was not justified because the employer unde1iook to prioritize the procurement of the water boots at the resumption of the 2021/2022 financial year. According to the Respondents, the boycott of duties by the Fmiher Applicants prejudiced the Eswatini Government; consequently, she was not obliged to remunerate the employees in as much as the *"no work, no pay"* rule was permitted by the **Industrial Relations Act, 2000 (as amended).**

[8] The Respondents denied that the salary stoppage was unilaterally implemented by the 2nd Respondent because the latter pa1iicipated in a Government Ministries' collective responsibility to effect the *"no work, no pay"*. The Respondents also contend that as Controlling Officer, the 2nd Respondent has the responsibility to manage the Ministry's expenditure, which in this case entails verification of attendance to duties by employees and payment of requisite salaries.

[9] It was fmiher refuted by the Respondents that a salary stoppage was effected; on the contrary they allege that the employer simply deducted from the Further Applicants' salaries money for days not worked, the recommended salary stoppage and disciplinary action are matters still

pending before the I[st] Respondent. Moreover, the Respondents disputed that the process to stop payment of the Further Applicant's salaries was being carried out clandestinely; Respondents also contend that the Fmiher Applicants were engaged about the measure.

ANALYSIS

[10] At the inception of arguments, the Applicants' counsel pursued a preliminary point raised in the Replying Affidavit that the Respondents had elected to counter the application by filing Replies instead of Answering Affidavits. In light of **Section 11** of the **Industrial Relations Act, 2000 (as amended)** *(Evidence on technical irregularities),*we asked Applicants' counsel if there was prejudice in the manner the Respondents responded to the Applicants' case, bearing in mind that the Respondents appeared to have answered all the Applicants' allegations; the Applicants' counsel elected not to pursue the point of law.

[11] On account of the Applicants' counsel election, the Respondents' counsel understandably chose not to advance any argument against the point oflaw. In the course of preparing this judgment and upon fmiher reflection, we held the view that both counsel should be afforded another opportunity to argue the point oflaw raised by the Applicants. The Court then invited both

counsel to file supplementary heads of argument; counsel elected not to do so, but would abide by the decision of the Court.

[12] **Rule 15 (1)** of the Court reads as follows:

> *"A party that applies for urgent relief shall file an application that so far as possible complies with the requirement of rule 14.* "

[13] Then **Rule 14 (1), (7)** and **(8)** provide that:

> *"Where a material dispute of fact is not reasonably foreseen, a party may institute an application by way of notice of motion supported bv affidavit .....A party who opposes the application shall attend court on the date stated in the notice of motion and deliver an answering affidavit of the party in open court ...The answering affidavit shall contain the information required in sub-rules 14 (4) (a), (b) and (c) and must clearly and concisely set out-*
>
> *{a) any preliminary legal issues which the respondent wishes to* ***raise;***
>
> *(b) which allegations in the founding affidavit are admitted and which are denied;*
>
> *{c) all material facts and legal issues upon which the respondent relies in its defence.* " [Emphasis added].

[14] In the case of **Simon Vilane N.O. and Others v Lipney Investments (Pty) Ltd (23/2013) [2014] SZSC 28 (30 May 2014),** the Snpreme Court observed as follows at **paragraph 9:**

> *"In its approach to the matter, the Court a quo took the view that because of the Appellants 'failure to file answering affidavits, there was simply no contest in this case and the application ought to be granted without fi1rther ado. I am unable to find any fault with this approach in the circumstances of this case. Indeed the learned Judge a quo is supported by authority. Thus, for example, in Chobokoane v Solicitor General 1985-1989 LAC 64 at 65, the Lesotho Court of Appeal made the following apposite remarks which I am happy to adopt in this jurisdiction: The affidavit made by the applicant constitutes and contains not only his allegations but also his evidence, and if this evidence is not controverted or explained, it will usually be accepted by the Court. In other words the affidavit itself constitutes proof, and no fi1rther proof is necessary ...and as there has been no denial, the matter must be approached on the basis that the allegations by the appellant are proved* "

[15] At **paragraph 11** of the **Simon Vilane case (supra),** the Supreme Court continues to opine as follows:

"At this stage I discern the need to draw attention to the following salutary remarks of Corbett J, as he then was, in ***Bader and Another*** *v* ***Weston and Another 1967 (1) SA 134 (C) at 136:*** *lt seems to me that, generally speaking, our application procedure requires a respondent, who wishes to oppose an application on the merits, to place his case on the merits before the Court by way of affidavit within the normal time limits and in accordance with the normal procedures prescribed by the Rules of Court ...* "

[16] **Erasmus: Superior Court Practice, Juta& Co (1994) Bl-39** states that:

"In application proceedings the ciffidavits take the place not only of the pleadings in an action, but also of the essential evidence which would be led at a trial. "

[17] In our view, it would result in a miscmTiage of justice if the Court were to ignore the Respondents' failure to file Answering Affidavits in the present matter. Firstly, the Applicants have not only made allegations, they have adduced evidence in support of those allegations by the very act of attestation. On the contrary, while the Respondents' Replies purport to dispute some of the Applicants' allegations, it is unclear whether the

denials are made by a person or persons who have personal knowledge of the facts. Secondly, the denials have not been verified under oath.

[18] It would therefore be a travesty of justice if the Applicants' evidence were to be defeated by unverified allegations of the Respondents in their Replies. The Applicants filed their Replying Affidavits on the 20th December 2021 wherein the point of law was raised and the matter was eventually argued on the 12th January 2022. So the Respondents have had adequate time to file proper answering papers, but elected not to do so. The Respondents must be taken not to have opposed the Applicants' .case on the merits.

[19] Notwithstanding the above holding, the Respondents raised a preliminary point that the Applicants were not entitled to the orders sought because they approached the Court with dirty hands in that they boycotted their duties, hence the application of the *"no work, no pay"* rule by the employer. This point *in limine* read with the Respondents' then answering affidavit under case no. **228/2021** between the same parties, which was annexed to the Applicants' Founding Affidavit in the present case, clearly identify the Respondents' grounds for opposing the application and the issues in dispute.

[20] It is common cause that the 1" Respondent, the body vested with the constitutional power of disciplinary control over public officers has not yet

taken a decision to stop payment of the Further Applicants' salaries. See:

Section 187 (1) of the **Constitution of Eswatini; Civil Service Board (General) Regulations;** and **Thembani Simelane v Chairman of Civil Service Commission and others (IC Case no. 87/2007).**

(21] We inquired from both counsel if the Further Applicants were absenting themselves from work, they were both ve1y emphatic that the employees were reporting for duties, but the point of departure was that they did not perform their duties. The Applicants' position is that the*"no work, no pay"* rule should be applied on employees who have not been supplied essential working tools.

(22] In the case **ofThemba Dlamini v Maloma Colliery Limited & another (IC Case No. 134/2011) at paragraphs 7-8,** the Court said the following:

" ...It is the duty of the employer to:-

7.1 receive the employee into service;

7.2 2 pay the employee's remuneration;

7.3 <u>ensure that workimz conditions are safe and healthy</u> (See: John Grogan: Workplace Law 8''' edition, p.62).

<u>It is important to also note that the dutv to pav remuneration arises not from the actual performance of work. but from the tendering of service</u> ... " [Emphasis added].

(23] Again in the case of **Enock Shongwe v Silver Solutions Investments (Pty) Ltd (IC Case No. 235/04) at paragraph 39,** the Court observed as follows:

> *"When an employee is paid a fixed monthly wage, a presumption arises that he is entitled to that wage provided he tenders his services and is available, willing and able to work. The 'no work, no pay' rule does not normally apply when the failure to work is not attributable to the employee."* (Our emphasis].

[24] The **Concise Oxford English Dictionary** defines the term *"tender"* as *"offer or present formally".* **Bryan A. Garner's: Black's Law Dictionary 8th edition** defines the expression *"tender of pe1formance"* as *"an obligor 's demonstration of readiness, willingness, and ability to pe,form the obligation."*

(25] Unfortunately for the Respondents, their allegations that the Further Applicants' duties are not limited to herding cattle and that Nkalashane Farm has better terrain, which has been denied by the Applicants in their Replying Affidavit, is contained in the Replies and as such has not been verified; consequently, it cannot gainsay the Applicants' version.

[26] In the case of **Swaziland Government v Swaziland Nurses Association and Another (25/2012) [2012] SZIC 25 (18 April 2012),** the Comt held that in terms of **Section 18 (2)** of the **Occupational Safety and Health**

Act, 2001, employees have a right to remove themselves immediately they perceive that their workplace poses imminent and serious danger to their safety and health. ·While the Court in that case endorsed the provisions of **Section 18,** it declared an intended strike based on the same section, unlawfol.

[27] The **Swaziland Government v Swaziland Nurses Association case (supra)** is distinguishable on the facts from this case. The Fmiher Applicants in the present case report for duty and have not declared a strike action. In the absence of an assessment repmi by an inspector in terms of the **Occupational Safety and Health Act,** which impugns the Fmiher Applicants' action and in the absence of a credible version by the Respondents, the Court will take the Applicants' version to be the more probable one.

CONCLUSION

[28] In the premises, the Court holds that the Respondents' implementation of the *"no worlc, no pay"* rule as well as stop payment of salaries against the Fmiher Applicants is legally untenable.

[29] In the result, the Court orders as follows:

[a] The Respondents are interdicted forthwith from withholding the whole or potiion of the Further Applicants' salaries, who are based at Nkalashane Sisa Ranch.

[b] Alternatively, the Respondents are ordered to forthwith reinstate and /or restore the Further Applicants' foll salary.

[c] The Respondents are directed to pay the Applicants' costs.

The Members agree.

V.Z. DLAMINI
ACTING JUDGE OF THE INDUSTRIAL COURT

For the Applicants:	Mr. M. Ndlangarnandla (MLK Ndlangamandla Attorneys)
For 1'' - 4th Respondents:	Ms. Z. Nsimbini (Attorney General's Chambers)