IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE Case No 239/2020

In the matter between:

SWAZILAND UNION OF FINANCIAL INSTITUTIONS AND ALLIED WORKERS Applicant

And

ESWATINI ROYAL INSURANCE CORPORATION Respondent

Neutral citation: Swaziland Union Financial Institution and Allied Workers v Eswatini Royal Insurance Corporation [239/2020] [2021] SZIC 35 (08 April, 2022)

Coram: **NGCAMPHALALA AJ**
(Sitting with Ms.N. Dlamini and Mr. D.P.M Mmango, Nominated Members of the Court)

Date De)ivered: 08th April, 2022

Summary: ***The Applicants instituted the present application seeking payment of two unpaid public holidays-public holidays fell during law/ul strike action- Respondent involved the no work no pay rule Section 87 of Industrial Relations Act 2000 (as amended)***

Held - ***Application dismissed- no orders to costs.***

JUDGEMENT

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[l] The pt Applicant is Swaziland Union of Financial Institutions and Allied Workers (SUFIAW), a union duly registered and incorporated as such in accordance with the labour laws of the kingdom of Eswatini, with its principal place of business in Mbabane, in the District ofHhohho.

[2] The Respondent is Eswatini Royal Insurance Corporation, a corporation duly registered and incorporated in tenns of the Laws of Eswatini, with its principal place of business in Mbabane in the district ofHhohho, Eswatini.

BRIEF BACKGROUND

[3] The matter was argued on the 9th November 2020, after both parties had their pleadings and comprehensive heads of arguments.

[4] The application before the Court, is an application to direct and order the Respondents to refund the Applicant and or its members their salaries for two (2) public holidays which were deducted/unpaid during a protected strike action between 27th August, 2019 and 7th October, 2019 as well as interest thereon at the rate of 9% per annum from the date of the unlawful deduction.

[5] In the present application, the Applicant seeks an order in the following terms-:

3.1 Ordering and directing the Respondent to refund the Applicant's and or members their deducted salaries for the two (2) public holidays of between 27 August 2019 to 7 October 2019.

3.2 Ordering and directing the Respondent to pay interest at the rate o/9% per annum from the date of the unlawful deduction until the date of compliance with the order of this court.

3.3 Cost of suit against the Respondent.

3.4 Further and/or alternative relief

[6] The Applicant's application is opposed by the Respondent on whose behalf an Answering Affidavit was duly filed and deposed thereto by Ms. Carol Muir, who stated therein that she is the Human Resources and Administration Manager at the Respondent's establishment and deposes to

the application by virtue of her position. The Applicant thereafter filed their replying affidavit.

[7] The matter came for arguments on the 9th December, 2020, the court accordingly reserved judgment in the matter.

[8] It is common cause that on or about the 28th November, 2017 the Applicant and the Respondent negotiated and signed a collective agreement, wherein the parties expressly agreed on working hours, terms of employment and the rules of engagement. It is further common course that on or about the 27th October, 2019 the Applicant's members who are employed by the Respondent exercised their right to engage in lawful strike for the duration of the aforementioned period.

[9] Within the period of the strike action, there were two gazetted public holidays, in which the employees were not at work, and were not expected to be at work. The said holidays were for the Reed dance and Independence Day. It is the Applicants averments that whilst Applicant's members were engaged in the lawful strike, the Respondent invoked the no-work-no-pay rule on the salaries for the month of September, and further effected deductions of the two holidays of Umhlanga and Independence Day.

[10] The Applicant aveffed that the conduct of the Respondent of deducting 14 days from its member's salaries instead of (12) twelve was unlawful and contrary to the terms of the Collective Agreement. The Applicant argued

that the purpose of the application was to obtain an order compelling the Respondent to refund the Applicants members the deduction of (2) two days salary, which were for the public holidays. Applicant avers that its members were not expected to work during the two public holidays, and in terms of the collective agreement were entitled to full pay.

[11] Therefore the conduct of the Respondent constitutes an unfair labour practice and is unlawful in terms of the collective agreement. Applicant ave1Ted that as a result of this unlawful conduct by the Respondent the Applicant was then forced to pay its members for the (2) two public holidays in question. The Applicant has on several occasions engaged the Respondent with regard to the unlawful deduction, but the Respondent has failed, refused and or neglected to refund the Applicant or its members the aforesaid deductions.

[12] Having refused to refund the Applicant or its members the Applicant reported a dispute at Conciliation, Mediation, Arbitration Commission (CMAC), which was eventually declared unresolved. In support of its case the Applicant cited the International Labour Organisation principle on the rights to strike and the **Industrial Relations Act, 2000 (as amended).**

[13] It was Applicant's submission that the strike was a lawful strike action protected by the law. The effect of a protected strike action in law is that there is guaranteed immunity from reaches of the civil law. Applicant avers that whilst the employer is not obliged to renumerate an employee for services not rendered during a strike action protected by laws, once the

employer invokes the no-work-no-pay rule, the employees are in tum protected from dismissal. Applicant avers that what flows from this protection is the underlying prohibition on discrimination contained m **section 100 of the Industrial Relations Act 2000(as amended);**

"An employer or employees association and a person acting on behalf of an employer or employers 'association, shall not, with respect to any employee or any person seeking employment-:

a) Discriminate against such employee or person because of that person's exercise or anticipated exercise of any right conferred or recognized by the Act, or because of the person's participation in any capacity in any proceeding under this Act;

b) Threaten such employee or person that person shall or may suffer any disadvantage from exercising any right conferred or recognized by this Act, or from participating in any capacity in any proceeding under this Act.

[14] It was Applicant's averment that the protection of rights extended to those rights conferred or agreed upon in terms of the Collective Agreement. The deduction as aforesaid by the Respondent were deducted because of this strike action, however Applicant argued that the Respondent failed to consider that this qualifies as a disadvantage to the employees in that they made dedu'ctions in respect of days when the employees would in law,·not have been obliged to be at work, and in the same manner their fellow employees were not at work on those days.

[15] The Applicant cited the case of **NATIONAL UNION OF MINEWORKERS V NAMAKWE SANDS A DIVISION ANGLO OPERATIONS LTD (C 836/2006) [2007] 2 ALC 203.** *"There was simply no evidence placed before this Court that showed that employees who were redeployed when there were no strikes were paid this redeployment allowances, the provisions of free meals and the excessive overtime worked falls foul of the provisions of* ***section 5 of the Labour Relations Act.*** *The respondent has failed to prove that its conduct did not infringe the provisions of* ***Section 4 and 5 of the Labour Relations Act."***

[16] The Applicant further cited the case of, **G4S CASH SOLUTION SA (PTY) LTD V MOTOR TRANSPORT WORKERS UNION OF SOUTH AFRICA (MTWU) AND OTHERS (JA/151) [2016] 2ALAC 22 (26 MAY 2016)** and **FOOD & ALLIED WORKERS UNION V AFRICAN PRODUCTS (PTY) LTD (1990) 11 ILJ 882 (ARB) where the Court** stated;

"a legal strike is the legitimate use of an economic weapon and does not automatically terminate the contract of employment. The contract of employment may be suspended for the period of the strike by agreement between the employer and the trade union or unilaterally the employer if the union notifies the employer.

Where the ;ntract of employment has not been suspended by the duration of the strike action, the provisions of the Basic Conditions of ***Employment***

Act no. 3 of 1983 *continue to apply. Accordingly, an employer is obliged to pay wages for any public holiday occurring during the period of the strike".*

[17] In closing it was submitted that the employee has a right to elect to suspend the employment contract such that the provisions of The Employment Act and Industrial Relations Act would not apply during the period of the legal strike action. However, the employer only elected to suspend the pay with regard to work done, and considering that the employees would not have been obliged to work on those days , they should have been paid for the public holidays.

[18] On the other hand the Respondent argued that it effected the no work no pay principle when the Applicants members engaged in a strike action on the 27th August, 2019, to the 7th September, 2019. Respondent avers that the no work no pay principle was invoked in terms of **Section 87** of the **Industrial Relations Act, 2000 (as amended)** in particular **87(3)** which reads:

"Notwithstanding ***subsection (2)*** *an employee is not obliged to remunerate an employee for services that the employee does not render during a protected strike, or protected lockout".*

[19] Respondent submitted that during the strike action, and given that the employees had engaged in a complete cessation of work, the Respondent

did not have the prerogative to call upon the employee to work during a public holiday that falls within the period of the strike action. Respondent argued that by virtue of the definition of a strike, the Respondent had no obligation to pay the employees for the public holiday that fell within the strike action.

[20] Respondent submitted that the purpose of a strike action is to inflict economic harm on an employer. Employees achieve this object by withholding their labour, causing the employer to lose business and to sustain overhead expenses without the prospect of an income. Whilst the employees do not render their services for the duration of a strike reciprocally, the employer is not obliged to renumerate the employees for services that the employee did not render during the strike action. The legal basis for exempting the employer of the obligation to pay strikers is that employees who are on strike by definition do not discharge the obligation to tender services.

[21] The obligation to remunerate only arises once the employees have tendered their services. The mere fact that they have given notice of their intention to call off the strike does not translate to the resumption of work unless the employees tender their services.

[22] The Respondent cited the following case; **NGEVU V UNION CO-OP BANK AND SUGAR COMPANY 1983 ILJ 41** and **3M SA (PTY) LTD V SACCAWU (2001) 22 ILJ 1092 In the case of COIN SECURITY**

(CAPE) V VUKANI GUARDS & **ALLIED WORKER S UNION** **1689 ILJ 239,** the court stated;

"The employee is under an obligation to work and the employer is under an obligation to pay for their services. Just asthe employer is entitled to refuse to pay the employee if the latter refuses to work, so the employee is entitled to refuse to work if the employee refuses to pay his wages which are due to him".

[23] The Respondent in closing cited the recent case of **MACSTEEL SERVICES CENTERS S.A (PTY) LTD V NATIONAL UNION OF METAL WORKERS OF SOUTH AFRICA,** where the court stated the following:

" *the reality in law is that the employees who rendered no service, albeit to no fault of their own or due to circumstances outside their employers control , like the global covid -19 pandemic and national state of disaster are not entitled to renumeration and the principle of no work no pay The question to be determined by this honourable Court is whether an employer is bound to pay wages to his employees for a public holiday which falls within a period during which the employees were on strike, and the employer having evoked the no work no pay principle.* "

[24] It is the Respondents av rment that the no work no pay principle applied indiscriminately during the entire cause of the strike action conducted by the Applicants members. **Section 87 of the Industrial Relations Act 2000 (as amended)** reads as follows;

3) Notwithstanding section (2) an employer is obliged to renumerate an employee for .services that the employee does not render during a protested strike or a protected lockout.

[25] The doctrine of no work no pay is a fundamental ax10m m industrial relations. The philosophies are very simple. When a person is employed, it is expected that the work assigned will be carried out. When this work is not done, the employee is not eligible for payment of any salary.

[26] The age -old rule gove1nmg relations between labour and capital, or management and employee of a fair day's wages for a fair day's labour remains as the basic factor in determining employees' wages. If there is no work performed by the employees there can be wages or pay unless of course, the employee was able, willing and ready to work but was illegally locked out, suspended or dismissed or otherwise illegally prevented from working. It would neither be fair nor just to allow (the complainant) to recover something they have not earned and could not have earned because they did not render services.

[27] It is common cause that the Applicants members engaged in a lawful strike action which commenced from the 27th August, 2019, and was set to continue indefinitely. It was therefore by its own definition an indefinite strike. From the papers filed it is evident that it was eventually called off on the 7th October, 2019. During this period the Respondent invoked the no work no pay principle for the duration of the strike action. It is common

cause that the Respondent did not pay its employees the full renumeration during the period, including two public holidays which we are now the subject of this application.

[28] In the recent case of in South Africa of **MACSTEEL SERVICES CENTRES S.A (PTY) LTD V NATIONAL UNION OF METAL WORKERS OF SOUTH AFRICA AND OTHERS [2020] JOL 47372 (LC),** the Court was approached on an urgent basis to make an order regarding the unprotected status of strike action. The judgment provides in clear and unequivocal terms that companies are within their right to invoke the principle of the no work no pay for extenuating and unforeseeable circumstances, such as preventing global coronavirus pandemic as they do not have a legal obligation to pay employees when they are unable to render their services.

"The reality in law is that the employees who rendered no service albeit to no fault of their own or due to circumstances outside their employer's control like the global covid-19 pandemic and national state of disaster are not entitled to renumeration and the Applicant could have implanted the principle of no work no pay. "

CONCLUSION

[29] After considering all aspects of this case, taking into account all the circumstances of the case, the interests of justice, fairness and equity, the present application cannot succeed and is hereby dismissed.

ORDER

(i) The application is dismissed.

(ii) There is **no order as** to **costs.**

One Member Agrees.

ACTING JUDGE OF TH INDUSTRIAL COURT OF SWAZILAND

For Applicant: KN Simelane & Company

For Respondent: Robinson Bertram