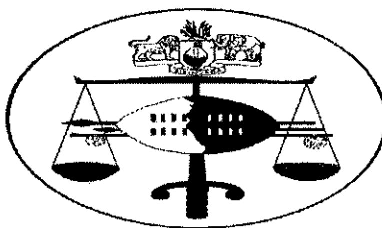

IN THE INDUSTRIAL COURT OF SWAZILAND

Case No 298/2023

In the matter between:

ESWATINI TRANSPORT & ALLIED LABOUR UNION	1st Applicant
MADODA DLAMINI & 14 OTHERS	2nd Applicant

And

SOUTHERN STAR LOGISTICS (PTY) LTD	1st Respondent
COMMISSIONER OF LABOUR	2nd Respondent
ATTORNEY GENERAL	3rd Respondent

Neutral citation: Eswatini Transport & Allied Workers Union & 15 Others v Sothern Star Logistics (Pty) Ltd & Others (298/23 [2023] SZIC 122 (29 November, 2023)

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

DATE HEARD: 8th November, 2023

DATE DELIVERED: 29th November, 2023

SUMMARY – *The Applicants have moved an urgent application to this Honourable Court seeking an order that the retrenchment notice issued by the 1st Respondent be declared null and void-further that the 1st Respondent comply with the provisions of Section 40 of The Employment Act, 1980- the application is opposed by the 1st Respondent-points in limine raised- ad urgency-ad matter has been overtaken by events-ad none compliance with Rule 15(1) and (2) (b) of Rules of Court.*

Held- *1. The points in limine on urgency and the failure by the Applicants to comply with Rule 15(1) and (2) (b) of the Rules of this Court are upheld.*

2. The Applicants Application is dismissed on these points in limine.

3. There is no order as to costs.

JUDGMENT

---

[1] The 1st Applicant is a recognized trade union duly registered in terms of **Section 27 of the Industrial Relations Act 2000** as amended, and the further Applicants are all Unionizable employees in different positions within the 1st Respondent's employ.

[2] The 1st Respondent is Southern Star logistics (Pty) Ltd, a fuel and other dangerous goods transportation company duly registered in terms of the laws of the Kingdom of Eswatini, with its principal business and head office being rooted in Matsapha.

[3] The 2nd Respondent is the Commissioner of Labour who is cited as the custodian of Labour Law, in the Kingdom of Eswatini within the Ministry of Labour and Social Security Offices, Government Offices, Mbabane.

[4] The 3rd Respondent is the Attorney General who is cited as the Government Legal Advisor and responsible for representing all Government entities, ministries and distinguished portfolios. Its offices are at Mbabane, Home Affairs/ Justice Ministry Building.

[5] The present application came before Court on a certificate of urgency wherein the Applicants, seeks to interdict the 1st Respondent from effecting the retrenchment notices terminating the 1st Applicant's members services on the 31st October, 2023. Further that the notices be declared null and void, and for the 1st Respondent to comply with the provisions of **Section 40 of the Employment Act, 1980**. The Applicant has now approached the Court seeking an order in the following terms:

5.1 That this Honourable Court dispenses with usual forms and procedures relating time limits, manner of service in application proceedings and deal with this matter as one of urgency in terms of Rule 15 of the Industrial Court Rules.

5.2 That this Honourable Court Condones Applicants' non-compliance with the Rules of Court;

5.3 That pending finalization of the application for setting aside the retrenchment notices issued by the Respondent on the 18th October, 2023 and served to Applicants on the 23rd October, 2023, an Interim Order be issued interdicting the Respondent from terminating the services of the further Applicants on the 31st October, 2023.

5.4 That the retrenchment notices issued by the Respondent be declared null and void ab initio, and therefore set aside;

5.5 Directing the Respondent to comply with the provisions of section 40 of Employment Act 1980 to the fullest and further hold consultations with Applicants under the auspices of Labour Commissioner as agreed on the 2nd October, 2023 held at Labour Offices Manzini;

5.6 Directing the Respondent to pay costs of the application in the event it is opposed;

5.7 Granting further and/ or alternative relief which this Honourable Court may deem just considering the circumstances of the case.

5.8 The Respondents are ordered to pay the costs of the application.

[6] The Application first came before this Court on the 31st October, 2023 wherein the parties agreed on dates for the filing of further pleading as well

as heads of argument. It was agreed that the matter be postponed to the 3rd November, 2023 at 9:30 am. On the said date the matter did not proceed as the Applicant was not present, and the matter was postponed to 8th November, 2023 at 8:30am which date the matter was heard and judgment accordingly reserved. The 2nd Respondent in the matter, namely the Labour Commissioner, initially advised that it was in support of the application by the Applicant and would in turn be filing pleadings. But at the eleventh hour advised the Court that it would not be filing any pleadings, but would abide by the Court's decision and sat in whilst the matter was being heard.

BRIEF BACKGROUND

[7] The 1st Respondent is a logistic company, transporting loads by road on behalf of its clients who are companies in various fields. The 1st Applicant and the 1st Respondent have a recognition agreement, that was signed and came into effect on the 13th October, 2023. Prior to the signing of the Recognition Agreement the 1st Respondent, on the 30th August, 2023 issued out notices to the 2nd Applicants advising them of a possible retrenchment, and explained the reasons and criteria to be applied in the event the redundancies being unavoidable, and meeting the Applicants for consultation.

[8] On the 31st August, 2023 consultations were held with the 2nd Applicants and their representatives, wherein the contemplated redundancies were discussed. Several meetings were held thereafter from the 7th September, 2023 to the 12th September, 2023, wherein thereafter a Section 40 notice was

issued to the Commissioner of Labour, and a similar notice was given to each affected employee. The Applicants aver that soon after the signing of the recognition agreement the 1st Respondent revoked the retrenchment notice to its members, whilst the 1st Respondent avers that same were put on hold to facilitate negotiations and not revoked.

[9] On the 2nd October, 2023 indeed a meeting was held at Labour Office in Manzini with the 1st Respondent and 2nd Respondent who was represented by the Principal Labour Officer Mr. Douglas Mvulo Dlamini. On the 3rd October, 2023, correspondence was issued to the 2nd Applicants advising them of the consultations, and all affected employees return to work. The Applicants allege that soon thereafter the 1st Respondent cancelled the consultation, before the Labour Commissioner on the alleged grounds that the principal Labour Officer was biased. The 1st Respondent then proceeded with the retrenchment notice which advised the Applicants that the last day of work would be the 31st October 2023, hence the present application before Court by the Applicants.

AD POINTS IN LIMINE

[10] The Respondent has raised three points of law **ads urgency; matter has been overtaken by events** and **none compliance with Rule 15(1) and (2) (a)**. At the hearing of the matter the parties agreed to argue the matter holistically dealing with the points *in limine* and the merits of the case.

RESPONDENT'S SUBMISSION

[11] The 1st Respondent was the first to make submission and dealt with the points *in limine* as raised. It was its submission that it would deal with the point on urgency simultaneously with the third point *in limine* failure by the Applicants to comply with **Rules 15 (1) and (2) (b) of the Rules of Court**. It was its argument that the Applicants *ex facie* its own papers, became aware of the 1st Respondent's notice of retrenchment on the 23rd October, 2023, when document "ES3" was served on its members. The 1st Respondent averred that the said document informed the 2nd Applicants on the continuation of the retrenchment process that they were aware of, and that the retrenchment would proceed on the 31st October, 2023.

[12] It was its submission that this notice gave the Applicants several days to approach the Court, however the Applicants left it for the eleventh hour and allowed for seven (7) days to lapse before serving it with the application on the afternoon of the 30th October, 2023. The Applicants further failed to indicate on the papers when the matter would be heard, despite the fact that the retrenchment process would take place the next day. It was its submission that when a party brings an application on the eleventh hour, the party is required to explain to the Court, why they have left the matter for the eleventh hour for hearing, and in support of this argument the Court was referred to the case of, **UNITED PLANTATION SWAZILAND LIMITED V CELIMPHILO HLANDZE I/C CASE NO 43/2020.**

[13] It was its averment that the reasons stated by the Applicants and on which they base their urgency is woefully inadequate to establish urgency. It averred that the above case of **CELIMIPHILO HLANZE (SUPRA),** is on all fours with the present matter, and the act of the Applicants is an abuse of the Court process. It was the 1st Respondent's argument that the Applicants have failed to explain, what action they took from the 23rd October, 2023 to the 30th October, 2023, when they filed their application, taking into consideration that the Courts sits over the weekend as well to hear urgent application.

[14] It was its argument that the Applicants have dismally failed to set out the reasons for urgency of the matter, save to state that the matter is urgent for all the reasons above. It was its argument that it is not for the Court to establish urgency, but the onus rests on the Applicants to show the Court what renders the matter urgent. It was its further argument that in any matter involving termination of employment there will be a disgruntled party which may view the termination as unlawful. The onus is on the party aggrieved to explicitly show why it believes the termination was unlawful, and what wrongfulness gives grounds for urgency. It was therefore its argument that in the present matter the Applicants have failed to explain explicitly what renders the matter before Court urgent.

[15] The 1st Respondent again referred the Court to the case of **CELIMPHILO HLANDZE (SUPRA)**, wherein the Court stated that when dealing with urgency the employee must state three (3) things:-

a) The circumstances that render the matter urgent, explicitly;

b) Reasons why the provisions of Part VIII of the Act should be waived and;

c) Reasons why the Applicant cannot be afforded substantial redress in due course.

[16] It was its argument that the Applicants application seems to stand on two legs, that the provisions of Section 40 of the Act have not been complied with, and that there has been insufficient notice. It was in averment that if the allegations that consultations have not been completed were true, which is denied, this would give rise to procedurally unfair termination, which can be sufficiently and satisfactorily be dealt with by this Court in the normal course, after the matter has been reported at the **CONCILIATION, MEDIATION, ARBITRATION COMMISSION (CMAC)** in terms of Part VIII of the **INDUSTRIAL RELATIONS ACT 2000 (AS AMENDED).**

[17] It was the 1st Respondent's submission that as in the cited case above, the Applicants have failed to explain to the Court why Part VIII of the Act should be waived, which is a peremptory requirement of **Rule 15(1) and (2) (b) of the Rules of Court.** It submitted that the Applicants simply say at paragraph 10:3 of the Founding Affidavit:

> *"The exigency of the matter does not require that a dispute be reported to CMAC as per Part VIII of the Industrial Relations Act 2000 as amended."*

It was its argument that the application has merely paid lip service to the requirements of Rule 15 (2) (b) as a consequence thereof the Applicants application should be dismissed on the two points *in limine*.

[18] On the second point *in limine* it was its argument that the Applicant inexplicably delayed in bringing the matter before Court and did not even set the matter down, but the matter was called on the 31st October, 2023, which was the effective date of the termination. It was its argument that when the matter appeared in Court, the termination letters had taken effect, nevertheless it was willing to have the matter argued on the 31st October, 2023 later in the afternoon at 1400hrs, however the matter did not proceed on the grounds that the 2nd Respondent wished to support the Applicants application, and jointly agreed to the postponement of the matter to Friday the 3rd November, 2023.

[19] It was the 1st Respondent's submission that the matter was already academic by the 31st October, 2023, and certainly academic at the hearing of the arguments of the matter. It averred that the cause of action which may have existed up to the 31st October, 2023 has now been extinguished by the termination of the services of the 2nd Applicants, and a new cause of action has arisen which is a potential claim for unfair dismissal, due to unfinished consultations.

[20] In closing on the point *in limine*, it was its argument that the Court does not have power to grant the relief as sought by the Applicants, as such an order would entail setting aside the termination of the 2nd Applicants without the

provisions of Part VIII of **The Industrial Relations Act** being observed, which the Court cannot do. Furthermore, the Court will not entertain a cause of action that has been extinguished. The Court was then referred to the cases of, **LIDWALA INSURANCE COMPANY V SIKHUMBUZO NHAMBULE IC CASE NO 586/23 SZIC**, and the case of **GIDEON MHLONGO V THE CITY COUNCIL OF MBABANE I/C CASE NO 251/23 SZIC.** It was its prayer that the Applicants application be dismissed solely on the points *in limine* as raised.

APPLICANT'S SUBMISSION

[21] The 1st Applicant began its argument by advising the Court of a typo within the papers, with the 1st Respondent title in the pleadings, which upon confirmation it was agreed same was a typo, and would be noted by the Court as it reads the pleadings. In rebuttal to the points as raised, on the point on urgency, the Applicants referred the Court to annexure *"EST 3"* which appears in its Founding Affidavit. It was its argument that even though the correspondence is dated the 18th October, 2023 the correspondence was only received by the 2nd Applicants on the 23rd October, 2023. It was their submission that if the Court was to disregard the Saturdays and Sundays, the Applicants have only taken six (6) days before coming to Court, which is not unreasonable. In support of this argument the Applicants referred the Court to the case of **VUSIE GAMEDZE V MANANGA COLLEGE I/C CASE NO 267/06**.

[22] It was its further submission that the case as referred to by the 1st Respondent of, **UNITED PLANTATION (SWAZILAND) LTD T/A**

TAMBUTI ESTATE V CELIMPHILO HLANDZE CASE 43/2020, is different to the case at hand, as the Applicant in that matter had taken thirteen (13) to move the urgent application, yet in this case it has only taken them six (6) days.

[23] The 1st Applicant then proceeded to deal with the second point *in limine*, the matter has been overtaken by events. It was their argument that it might have slipped their minds when the matter came to Court to pray for an interim order staying the retrenchment, but the postponement was at the instance of both parties. It was their further argument that the matter has not been overtaken by events because the parties were all present before Court when the matter was first called, and agreed to the parties being given an opportunity to file their pleadings, and as such this was confirmed by the Court and by agreement the matter was postponed. It was the Applicants argument that the 1st Respondent's act of continuing with the retrenchment process is contemptuous and a nullity in law. Therefore, the matter is not academic, the 1st Respondent is not allowed to blow both hot and cold, and therefore its point *in limine* should be dismissed.

[24] The Applicants then proceeded to deal with the last point *in limine* as raised by the 1st Respondent, non-compliance with Rule 15(1) and (2) (b). the Applicants referred the Court to page thirteen (13) of its application, under the title urgency, and read paragraph 11.1 which reads,"

"The matter is urgent for all the reasons that have been outlined above. I humbly submit that this matter is verily urgent. The unlawful retrenchment

of fourteen (14) employees is to take effect on the 31st October, 2023 without following the due process of the law."

It was the Applicants argument that the 1st Respondent submission that it is not for the Court to look for urgency in the pleadings does not read true in the present circumstances, they averred that the Court does not need to do so, as they have stated in their papers what renders the matter urgent, and accordingly the matter is correctly before Court, and the 1st Respondent's points *in limine* should be dismissed and the matter heard on the merits.

ANALYSIS OF EVIDENCE AND THE APPLICABLE LAW

[25] The Court will firstly deal with the points *in limine* as raised by the 1st Respondent, as it is of the view that the matter may be deposed of on the points *in limine* without dealing with the merits of the case. When a party brings a matter on a Certificate of Urgency it is asking the Court to open the door for it and move from its normal roll, and other matters that are before it and to hear the matter on an urgent basis. The Applicant is required to demonstrate that the hearing of the matter is that of life or death, and that the hearing of the matter in due cause will render it academic.

[26] The provisions of **Rule 15 (2) (a), (b) and (c) of The Industrial Court Rules of 2007** are peremptory for urgent applications. This Rule regulates as follows:

> *"The Affidavit in support of the application shall set forth explicitly: -*
>
> *(a) The circumstances and reasons which render the matter urgent.*

(b) The reasons why the provisions of part VIII of the Act should be waived.

(c) The reasons why the Applicant cannot be afforded substantial relief at a hearing in due course."

Rule 15(3) goes on to state that *"on good cause shown, the Court may direct that the matter be heard as one of urgency."*

Correctly in terms of this Rule, the Court may direct that a matter be heard as one of urgency on good cause shown that is upon satisfactory compliance with Rule 15 (2) (a), (b), (c) of the Rules of the Industrial Court. Failure to comply with Rule 15 will result in a party failing to show cause, and as a result fail to prove the urgency. The onus is on the Applicant to demonstrate in the body of the affidavit facts which will persuade the Court to hear the matter on an urgent basis. There is no list of circumstances that atomically qualify a matter to be heard on an urgent basis. Each matter is to be dealt with on its own peculiar facts.

[27] The Applicants have basically stated three major reasons for approaching this Court on an urgent basis, namely that the 1st Respondent has failed to comply with **Section 40 of the Employment Act 1980**; that consultations have not been finalized and are ongoing; and lastly that the exigency of the matter does not require that a dispute be reported to **CMAC** as per Part VIII of the Industrial relations Act (supra).

[28] In the decided case of this Court; **VUSI GAMEDZE V MANANGA COLLEGE I/C COURT CASE NO 207/2006**, the Court stated the following;

"Normally, the Industrial Court will not take cognizance of any dispute which has not been through the conciliation process prescribed by part VIII of the- Industrial Relations Act No 1 of 2000 and certified as an unresolved dispute. The Applicant must not only satisfy the Court that the matter is sufficiently urgent to justify the usual time limits prescribed by the rules of Court being curtailed, but he must explicitly set forth the circumstances which render the matter urgent, and state the reasons why he cannot be afforded substantial relief if the matter were to be dealt with in the normal way."

[29] The Court agrees with this principle as stated in the above case, for the Court to entertain a matter on an urgent basis the party aggrieved must explicitly set forth the reasons the matter is urgent. In the present matter the Applicants have dismally failed to state the reasons that render the matter urgent for the following reasons;

(a) They do not state why the application was filed a day before the intended retrenchment date, having fully been aware as of the 23rd October, 2023 that the 1st Respondent intended to continue with the retrenchment as previously stated on the 13th September, 2023.

(b) The Applicants have failed to set forth the reasons why the provisions of **Part VIII of the Industrial Relations Act (supra)** should be waived.

[30] Whilst the Court accepts that the Court is required to hear all matters brought before it, the urgency procedure must not be abused or used in underserving cases. This procedure is certainly not just there for the taking

as it were. Bringing matters on an urgent basis where such urgency is unwarranted not only causes prejudice to the other party, but to the roll of the Court and the administration of justice in general. The grounds of such urgency must be clearly and adequately explained and justified. In the case of, **EDWIN MANANA V ESWATINI WATER AND AGRICULTURAL DEVELOPMENT ENTERPRISE & ANOTHER I/C CASE NO. 220/2022** the Court stated,

"All disputes that come before Court for determination are to some extent urgent to the Applicants who bring them. By simply stating in the papers that the matter is urgent and the strength of the Applicant's case warrants that the matter be heard on an urgent basis should not be used as the only factors to determine whether or not to enroll a matter as urgent. Otherwise, all matters with a prima facie strong case will qualify to be enrolled on urgency basis. That would be contrary to the spirit of Rule 15. There should be other factors to be considered which includes but not limited to irreparable harm that would occur if the matter is not determined urgently."

[31] The Court aligns itself with the case as cited above and agrees with this principle too, that a well-grounded apprehension of irreparable harm must be proven to justify urgency.

[32] In the present matter the reason the Applicant has approached this Court on an urgent basis is articulated in paragraph 11.1 of its Founding Affidavit which reads,

"The matter is urgent for all the reasons that have been outlined above. I humbly submit that this matter is verily urgent. The unlawful retrenchment of fourteen (14) employees is to take effect on the 31st October, 2023 without following the due process of the law."

Save for the above assertion, the Applicants have failed to articulate to this Court what irreparable harm they will suffer, if the matter is not heard on an urgent basis save to state that the exigency of the matter does not require that a dispute be reported to CMAC as per **Part VIII of the Industrial Relations Act 2000 (as amended).**

[33] When dealing with matters brought on a certificate of urgency, the Court is required to balance the rights and interests of the Applicants with the prejudice that the Respondents may suffer if the matter is heard on an urgent basis. The Applicants have a duty to place before this Court in their Founding Affidavit all the necessary facts in order for the Court to make an informed decision. The Applicants have failed in this regard to provide sufficient facts before Court which render this matter to be heard on an urgent basis. The Applicants have further dismally failed to establish the requirements of Rule 15 of the Rules of Court. Therefore, the points *in limine* as raised by the 1st Respondent on urgency and the failure by the Applicants to comply with Rule 15(1) and (2) (b) of the Rules of this Court are upheld. The Applicants are directed to file fresh proceedings, using the provisions of **Part VIII of the Industrial Relations Act, 2000 (as amended).** The Court will not proceed to deal with the remaining point *in limine* and the merits.

Accordingly, the Court makes the following Order

33.1 The points *in limine* on urgency and the failure by the Applicants to comply with Rule 15(1) and (2) (b) of the Rules of this Court are upheld.

33.2 The Applicants Application is dismissed on these points *in limine*.

33.3 There is no order as to costs.

The Members Agree.

B. NGCAMPHALALA

ACTING JUDGE OF THE INDUSTRIAL COURT OF SWAZILAND

FOR APPLICANT:	Mr. B. Tfwala (Eswatini Transport & Allied Labour Union)
FOR 1ST RESPONDENT:	Mr. M. Sibandze (Musa M. Sibandze Attorneys).
FOR 2ND & 3RD RESPONDENT:	Mr. B. Zulu (Attorney Generals Chambers).