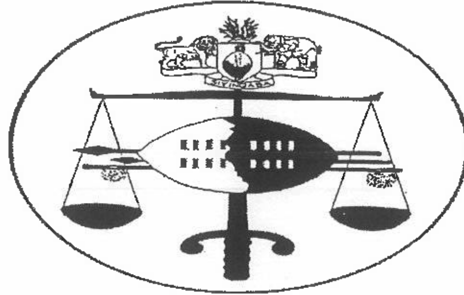

IN THE INDUSTRIAL COURT OF APPEAL OF ESWATINI

Case No. 8/2021

In the matter between:

SWAZILAND UNION OF FINANCIAL INSTITUTIONS AND ALLIED WORKERS UNION **Appellant**

and

ESWATINI ROYAL INSURANCE CORPORATION **Respondent**

NEUTRAL CITATION: ***Swaziland Union of Financial Institutions and Allied Workers Union v Eswatini Royal Insurance Corporation (08/2022) [2022] SZICA 06 (17 February 2023)***

***CORAM*: NSIBANDE JP, VAN DER WALT and MAZIBUKO JJA**

HEARD: 28 July 2022

DELIVERED: 17 February 2023

Summary

Paid public holidays – generally *- in terms of* __section 2__ *of* ***Employment Act, 1980*** *employee entitled to full pay in pursuance of a Wages Regulation Order or collective agreement covering terms and conditions of employment*

Paid public holidays - collective agreement *entered into between Appellant Union and Respondent Employer - provisions include that employer shall observe Gazetted public holidays – only stated exceptions are that (1) overtime may be worked on public holidays by agreement; (2) compulsory overtime may be required in emergency situations; and (3) as regards Christmas holidays, which would include the public holidays of Christmas Day, Boxing Day and New Year's Day, services of employees retained and employees obliged to tender and/or render services to employer also on those days*

Paid public holidays - collective agreement *entered into between Appellant Union and Respondent Employer - in absence of exceptions*

or contrary agreement finding application, all employees entitled to refuse to tender or to render services on such public holidays and all employees entitled to be paid regardless of whether or not they had tendered or rendered services on those days

Strike action – remuneration - generally – "no work no pay" principle *-* ***section 87(3)*** ***of Industrial Relations Act, 2000*** *provides employer not obliged to remunerate employee for services that employee does not render during protected strike or protected lockout*

Strike action – remuneration - public holiday/s *falling within period of protected strike or lockout action – whether remuneration may be withheld or deducted in respect of public holidays based on above* ***section 87(3)*** *- striking and non-striking employees in absence of contrary agreement entitled to refuse to work on those days and striking employees therefore in the same position as non-striking employees vis-à-vis paid public holidays*

Strike action – prohibited employer practices *- employer in absence of agreement to the contrary not entitled to deduct or to withhold*

remuneration from striking employees in respect of public holidays falling within period of protected strike action – to do so, would amount to prohibited discriminatory employer practice in terms of ***section 100(1)(a)*** *of said Act*

JUDGMENT

Cur adv Vult
(Postea: 17 February 2023)

VAN DER WALT, JA

INTRODUCTION

[1] Certain members of the Appellant, a Trade Union, engaged in a strike action over the period 27 August 2019 to 7 October 2019. Two Gazetted public holidays being the Reed Dance (***Umhlanga***) holiday and Independence (***Somhlolo***) Day, fell within this period. The Respondent Employer invoked the *"no*

work no pay" principle inclusive of these public holidays and the Appellant made payment to its employee members to compensate for such non-payment, resulting in the Appellant's application in the Court *a quo* seeking the following relief:

> ***"1. Ordering and directing the Respondent to refund the Applicant's [sic] and or its members their deducted salaries for the two (2) public holidays between 27 August 2019 to 7 October 2019;***
> ***2. Ordering and directing the Respondent to pay interest at the rate of 9% per annum from the date of unlawful deduction until the date of compliance with the order of this Court;***
> ***3. Cost of suit against the Respondent;***
> ***4. Further and or alternative relief."***

[2] The crisp question of law *a quo,* and now serving before this Court,[1] is whether or not employees who are engaged in a lawful or protected strike, are entitled to remuneration in respect of a Gazetted public holiday/s falling within the period of the strike action.

[3] The Court *a quo* decided the question in favour of the Employer, holding that:

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[1] Non-contentious applications by the Appellant for amendment of the citation and condonation in respect of the appeal record were granted and arguments proceeded on the substance of the appeal

"[26] The age – old rule governing 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 [sic][2] *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."* [3]

[4] In consequence, the application was dismissed, resulting in the instant appeal.

A APPLICABLE LAW AND APPLICATION THEREOF: SUBMISSIONS ON BEHALF OF PARTIES

[5] Certain provisions contained in the Industrial Relations Act, No 1 of 2000 (hereinafter referred to as the **"Industrial Relations Act,"**) the Employment Act, No 5 of 1980 (hereinafter referred to as the **"Employment Act"**) and the Collective Agreement governing the employment relationship between the parties (hereinafter referred to as the **"Agreement"**) served as points of departure for Counsel's submissions.

[2] It appears that the word *"not"* had been omitted

[3] Judgment Paragraph [26]

[6] At the centre of the controversy, lies the *"no work no pay"* principle entrenched in **section 87(3)** which reads:

> *"(3) Notwithstanding subsection (2)[4], an employer is not obliged to remunerate an employee for services that the employee does not render during a protected strike or a protected lockout."*

A.1 Submissions on behalf of the Appellant

[7] Mr K Simelane relied mainly on the following provisions:

7.1 Industrial Relations Act

7.1.1 The definition of *"strike"* - **section 2**:

> *""strike" means a complete or partial stoppage of work or slow down of work carried out in concert by two or more employees or any other concerted action on their part designed to restrict their output of work against their employer, if such action is done with a view to inducing compliance with any demand or with a view to inducing the abandonment or modification of any demand concerned with the employer-employee relationship"*

[4] i.e., *"(2) A person does not commit a delict or a breach of contract of employment by reason only of taking part in a protected strike or a protected lockout."*

7.1.2 *Prohibited employer practices* – <u>section 100(1):</u>

> *"(1) "An employer or employers' 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 and trade unions"—*
> *(a) Discriminate against such employee or person because of that persons exercise or anticipated exercise of any right conferred or recognised 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 recognised by this Act, or from participating in any capacity in any proceeding under this Act."*

7.2 **The Employment Act** - definition of "*paid public holiday*" in <u>section 2</u>:

> *""paid public holiday" means a public holiday on which an employee is entitled to a holiday on full pay in pursuance of a Wages Regulation Order or a collective agreement covering his terms and conditions of employment;"* and

7.3 **The Agreement**

7.3.1 **<u>Clause 3.1</u>:**

> *"Normal hours of work for clerical and non-clerical employees shall be as follows:*
>
> *Monday to Thursday ... – 8 hours 45 minutes (including 1 hour luncheon break.) Luncheon break shall be taken at 1300 hours or such other time as agreed between the employee and the manager; such arrangement shall be interim or temporary;*
> *Friday 8 Hours, 30 minutes (including 1 hour luncheon break);*
> *Credit will be given for public holidays, off periods and off days permitted by the employer."*

7.3.2 **Clause 4.1:**

"All gazetted public holidays shall be observed by the employer."

[8] The following cases and arbitral decisions were referred to:

8.1 As regards public holidays, the summary in the South African arbitral decision in **Food & Allied Workers Union v African Products (Pty) Ltd** [5] in part reads that:

"..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 by the employer if the union notifies the employer.

Where the contract of employment has not been suspended for the duration of a legal strike, the provisions of the Basic Conditions of Employment Act 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."

8.2 As regards prohibited employer practices with reference to discrimination:

8.2.1 The South African Labour Court judgment in the case of **National Union of Mine Workers v Namakwa Sands – a Division of**

[5] (1990) 11 ILJ 882 (ARB)

Anglo Operations Limited[6] was concerned with redeployment advances and it was held amongst others that:

"33. The right to strike is a right enshrined in our Constitution. The right to strike is an important right that employees have acquired after years of struggle in the workplace. The LRA[7] has placed certain limitations on the right to strike. Section 4(2) of the LRA grants every member of a trade union to participate in lawful activities of that trade union. The right to strike is one such right. Section 5 of the LRA grants employees certain protections. Section 5(1) outlaws discrimination and states that no person may discriminate against an employee for exercising any right conferred by the LRA. In terms of section 5(3) no person seeking employment in exchange for that person not exercising any right conferred by the LRA or not participating in any proceedings in terms of the LRA. However, nothing in this section precludes the parties to a dispute from concluding an agreement to settle that dispute.

....

"46. To summarise, the respondent's conduct in paying the non striking employees the redeployment allowances, the provision of free meals and the excessive overtime worked falls foul of the provisions of section 5 of the LRA. The respondent has failed to prove that its conduct did not infringe the provisions of section 4 and 5 of the LRA."[8]

8.2.2 The local Industrial Court case of ***The Swaziland National Association of Teachers v Swaziland Government & Another*** [9] wherein it held as follows concerning dismissal:

"In terms of the laws of this country an employee is not acting unlawfully if he/she participates in a lawful or protected strike action. Any employer, whether it be the Government or a private employer, who initiates disciplinary action against, and dismisses an employee for taking part in a lawful strike action is clearly acting in contravention of the laws of this country. Such conduct amounts to automatically unfair dismissal."

[6] **Case No. C836/2006** at pages 31, 32 and 40

[7] I.e., the **Labour Relations Act 1995**

[8] Abbreviation of cited portion Court's own

[9] **Case No. 258/2012** at page 12

[9] Mr Simelane's submissions can be summarised as follows:

9.1 The affected employees at all material times remained employees of the Respondent and the strike did not deprive them of that status, or amount to a suspension of the contract of employment;

9.2 In terms of the **Agreement**, "***Credit will be given for public holidays, off periods and off days permitted by the employer"*** [10] and ""***All gazetted public holidays shall be observed by the employer;"*** [11]

9.3 The invocation of the "*no work no pay*" principle as contained in **section 87(3)** of the **Industrial Relations Act** finds application only to non-rendering of service and does not apply to any right to call employees to work;

9.4 The reasoning behind the conclusion in the South African arbitral decision in the **Food & Allied Workers Union v African Products (Pty) Ltd** referred to above, would be of equal application to Eswatini law;

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[10] Clause 3.1

[11] Clause 4.1

9.5 The refusal by the Respondent to remunerate accordingly, amounted to unfair discrimination with reference to **section 100** of the **IRA 2000;** and

9.6 In the premises, the Court *a quo* erred in holding to the contrary.

A.2.2 Respondent

[10] Mr Z Jele on behalf of the Respondent referred to the following:

10.1 The statement by the author J G Grogan as Acting Judge in the South African Labour Court case of **FGWU and Others v Minister of Safety and Security and Others** [12] that:

> "***The purpose of strike action is to enable workers to bring pressure to bear on their employers by the withdrawal of their labour in order to induce them to comply with some work related demand. To facilitate the achievement of this purpose, the Act has limited the employer's common law right to terminate on the basis of what would otherwise be a breach of contract and the legislature has created the concept of a protected strike... To equalise the power balance, the employer's common law right to withhold payment of remuneration for the***

[12] **Case No P508/98**, reasons delivered 2 January 1999 [incorrectly cited in the Respondent's Heads of Argument as **2012(2) SA 177 (SCA)**]

duration of the strike is confirmed. So also, by implication, is its right to take in replacement labour."[13]

10.2 The statement by Grogan, as arbitrator in **NEHAWU/University of Transkei**,[14] that:

"An employer's entitlement to withhold the salaries of strikers is a matter of law, not fairness."

10.3 In the Zimbabwean Supreme Court case of *National Railways of Zimbabwe v Zimbabwe Railway Artisans Union & Others*[15] it was remarked as follows in respect of the employer's right to withhold remuneration:

"At common law the obligation of an employer to pay wages is dependent upon performance by the servant of the work that he contracted to do. Thus, in The Law of Master and Servant in South Africa by Norman Scoble at 203, the author states:

The legal obligation of an employer to pay wages is dependent entirely on the servant having performed his part of the contract in rendering the services stipulated for by the parties. The basis is 'no work no pay' (unless the master is to blame for failing to provide any work for the servant to perform) (Vadasz v Cohen, 1993 TPD 100)" (see also Christie Business Law in Zimbabwe at 310-311)... Thus, an employee who participates in a lawful collective job action is not entitled to his salary unless that remuneration was being paid in the form of services, in which case the remuneration must be paid but may be recovered by the employer by action instituted by him in the Labour Court for this purpose. The point being made here is that the striking employee is not entitled to remuneration even where the "strike" is lawful."[16]

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[13] Paragraph [19], abbreviation Court's own

[14] [2004] 11 BALR 1345 (P)

[15] [2005] JOL 15334 (ZS)

[16] Abbreviated passage

10.4 The South African Labour Court, in dealing with employees who did not come to work due to circumstances beyond their control namely the COVID-19 pandemic, considered the applicability of the *"no work no pay"* principle in the case of **Macsteel Services Centres SA (Pty) Ltd v NUMSA & Others**[17] and held that:

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

10.5 In the South African arbitral matter of **PSA obo Lehobo/ Department of Education – GP,** [18] which concerned family responsibility leave, it was stated that:

> ***"The employee's argument is that while he is on strike, he is still an employee who would be entitled to all the benefits that an employee would be entitled in the ordinary course. This is precisely where the employee's argument deserves scrutiny. The employee exercised his collective and constitutional right to go out on strike and did so with the understanding that such an action attracts the consequence of "without pay". It is trite law that when employees are out on strike, the no work no pay principle would apply.***
>
> ***Inherent in the definition of no work no pay is that whatever benefits would normally accrue to employees would, in this instance, not accrue. The employee attempts to divert attention from this principle by stating that he had called in to the supervisor to request that he be granted leave. To accept the argument of the employee that he would indeed be entitled to the benefit of family responsibility leave would defeat the consequence of no work no pay."***

[17] (J483/20) [2020] ZALC JHB 129, Paragraph [82]

[18] [2008] 11 BALR 1062 (PSCBC)

10.6 In the South African Labour Court case of **National Union of Mineworkers obo Members v Cullinan Diamond Mine a Division of Petra Diamond (Pty) Ltd** [19] it was remarked as follows concerning bonuses:

> ***"The conduct complained of is the non-payment of a bonus to striking employees. For the purpose of this part of the case, for sake of argument, I depart from the premise that the bonus paid to non-strikers was indeed the annual performance bonus as alleged by the applicant. The immediate question I must turn to is whether by paying the annual performance bonus to the non striking employees as such is discriminatory or not? The discrimination prohibited by the EEA[20] is one that is unfair, one that impairs human dignity. When an employee is not paid any form of a bonus his or her dignity is not being impaired. The reason fathomed by the applicant for such non-payment is that it is because they participated in a strike action. Participation in a strike action is not a listed grounds. In any event, evidence shows that the basis for differentiation was having contributed to the achievements and not the participation in a strike action per se. An arbitrary ground is aground that is founded on, or subject to, personal whims, prejudices and/or caprice. However for such a ground to found a claim under the rubric of unfair discrimination it must be pejorative and be closely connected to one of the listed grounds."***

10.7 As regards the *exceptio non adimpleti contractus* i.e., failure by one party to perform his or her obligations entitles the other party to withhold their counter-performance, the local High Court in *Currie & Sibandze Attorneys & Another v Khumalo*[21] cited with

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[19] [2019] JOL 41576 (LC)

[20] i.e., the Employment Equity Act 1998

[21] *(1130/2012) [2013] SZHC 26 (28 February 2013)*

approval the following words of De Villiers J in **Myburgh v Central Motor Works:**[22]

> *"The defence of exceptio non adimpleti contractus is only applicable in respect of reciprocal agreements where parties undertake to perform in return for the counter-performance in question. It is of importance that there should be a connection between the performance of the one party and the counter performance of the other party."*

[11] The gist of Mr Jele's argument, premised on the above, was that:

11.1 The principle of *"no work no pay"* has been upheld in a number of judgements in this jurisdiction and is applicable both in terms of strike action, and absence from work without good reason;

11.2 In the absence of actual work or a tender to work, and in alignment with the *exceptio non adimpleti contractus,* an employer has no obligation to remunerate an employee; there was a reciprocal agreement in which the affected employees had a duty to render their services, upon which the Respondent would be obliged as a matter of law to remunerate such employees;

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[22] 1968 (4) SA 864 (T)

11.3 The Agreement in **<u>Clause 3.2.1</u>**[23] provides for overtime which would include overtime on public holidays, which is in line with the position that an employer's obligation to remunerate is dependent on the employees rendering or tendering their services in line with their contract of employment. An employer is entitled to call upon employees to perform urgent or outstanding work on a public holiday.[24]

11.4 It would be unconscionable for an employer who is unable to utilise the services of an employee during the course of a strike action, to be required to remunerate them;

11.5 The entitlement of an employer to withhold remuneration of strikers is a matter of law and not one of fairness. If one were to travel the fairness route, given that the intention of the striking employees was to hurt the employer, it seems inimical that the

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[23] ***"Overtime shall be limited to two (2) hours per day beyond normal working hours except on weekends and public holidays in which case the overtime may be set upon agreement."***

[24] This would tie in with **<u>Clause 3.2.7</u>** i.e., ***"The working of overtime shall not be compulsory except in emergency situations."***

same employer destined to be hurt, would then be benevolent and remunerate employees whose fixed intention was to bring about harm to the employer;

11.6 In all the circumstances, the Court *a quo* did not err in law in finding that the Respondent was not obliged to make payment to the affected striking employees in respect of public holidays falling within the course of the strike action.

C ANALYSIS

[12] The Court notes, in addition to what was expressly referred to in the submissions by Counsel, that:

12.1 "***remuneration***" is defined in **section 2** as:

> ""*remuneration" means wages or salary and any additional payments payable in cash or in kind directly or indirectly by the employer in connection with the employment of an employee;"* and

12.2 The said **section 87(3)** is echoed in **Clause 9.8** of the **Agreement**:

"*9.8 Protest action*

The Employer is not obliged to remunerate an employee for services that the employee does not render during protest action;"

12.3 Clause **3.2** deals with (paid) overtime and **Clause 3.2.7** reads:

"The working of overtime shall not be compulsory except in emergency situations."

12.4 **Clause 4** of the Agreement, in its entirety, reads as follows:

"CLAUSE 4 – PUBLIC HOLIDAYS"

4.1 All gazetted public holidays shall be observed by the Employer.

4.1.1 Notwithstanding the above, for Easter holidays, business shall close at noon on the eve of Good Friday. On Christmas Eve, business shall close at noon until the 1st January of the following year (New Year), and these days shall not be considered leave days.

4.1.2 Management shall reserve the right to retain staff for provision of services to clients during the Christmas holidays and those individuals shall be entitled to take off the same number of working days thereafter, but not later than the second week of January the following year. Management shall advise the employees not less than one month before."

12.5 The following public holidays are stipulated in the Schedule to the

Public Holidays Act, 1938:

New Year's Day (1st day of January)
Incwala Day (23rd day of December)
Good Friday
Easter Monday
National Flag Day (25th day of April)

Ascension Day
The Kings Birthday (19th day of April)
Commonwealth Day (Second Monday in June)
Public Holiday (22nd day of July)
Umhlanga (Reed Dance) (3rd September, 1991)
Somhlolo (Independence Day) (6th day of September)
Christmas Day (25th day of December)
Boxing Day (26th day of December)

[13] There does not appear to be any local case precedent pertaining to payment in respect of a public holiday/s *vis-à-vis* strikes and the cases or arbitral decisions cited by Counsel in support of their respective submissions, originate from foreign jurisdictions.

13.1 The Court finds it necessary to repeat the caution that foreign sources should be applied with circumspection, more so in labour matters where for instance as regards South Africa, there are significant statutory differences from our law. Although in many cases the foreign authorities may be in point, helpful and persuasive, more so where there is no Eswatini precedent on the topic under consideration, there are pitfalls that may lie in wait for the unwary.

13.2 The issue of public holidays *viz-a-viz* strikes in Eswatini evidently was unexplored legal terrain prior to the judgment *a quo.* Counsel *in casu* clearly went to great lengths to find whatever material may be of assistance to the Courts, for which the Court is duly grateful. The critiques below therefore should be accepted in that spirit, not be seen as detracting from the valiant worth of Counsel's efforts or from the challenge facing the Court *a quo;* the issue under consideration by no means is a straightforward one.

13.3 The South African equivalent of **section 87** of the **Industrial Relations Act**[25] is wider, captured as follows in **section 67(3)** of the South African **Labour Relations Act 66 of 1995**:

> ***"(3) Despite subsection (2)[26], an employer is not obliged to remunerate an employee for services that the employee does not render during a protected strike or a protected lock-out, however—***
>
> ***(a) if the employee's remuneration includes payment in kind in respect of accommodation, the provision of food and other basic amenities of life, the employer, at the request of the employee, must not discontinue payment in kind during the strike or lock-out; and***

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[25][i.e., *"(3) Notwithstanding subsection (2), an employer is not obliged to remunerate an employee for services that the employee does not render during a protected strike or a protected lockout."*]

[26] Similar to Eswatini section 87(2)

(b) *after the end of the strike or lock-out, the employer may recover the monetary value of the payment in kind made at the request of the employee during the strike or lock-out from the employee by way of civil proceedings instituted in the Labour Court."*

13.3 There is no definition for "***paid public holiday***" [27]in the South African **Basic Conditions of Employment Act 75 of 1997.**

13.3.1 The closest neighbour would be **section 18(1)** of the latter which stipulates that:

> *"An employer may not require an employee to work on a public holiday except in accordance with an agreement."*

13.3.2 This appears to be the basis for the following extract from the South African Labour Appeal Court judgment in **National Union of Mineworkers obo Employees and Others v Commission for Conciliation Mediation and Arbitration and Others:**[28]

> *"[11] Second respondent accepted that the employees had been correct that third respondent had wrongly deducted money that was due to these employees for the public holidays, Good Friday and Election Day of 2004. Accordingly, it was stated that the employees had every reason to be upset for the fact that the employer deducted*

[27] [Eswatini: *""paid public holiday" means a public holiday on which an employee is entitled to a holiday on full pay in pursuance of a Wages Regulation Order or a collective agreement covering his terms and conditions of employment"*]

[28] (CA11/2007) [2011] ZALAC 7; [2012] 1 BLLR 22 (LAC); (2011) 32 ILJ 2104 (LAC) (1 April 2011), Paragraph [11]

the monies that they were entitled to for these days... the employees were entitled to refuse to work on public holidays...."

13.4 Cases referred to by Counsel herein pertain to diverse issues such as redeployment allowances, the provision of free meals, excessive overtime, daily allowances, COVID-19, family responsibility leave and bonuses. The only decision expressly dealing with the public holidays during strike action, is the South African arbitral decision in **Food & Allied Workers Union v African Products (Pty) Ltd** relied upon by the Appellant. That matter concerned the **South African Basic Conditions of Employment Act 3 of 1983** and in the body thereof also refers to a particular **Wage Determination.** The 1983 Act as well as the **Wage Act 5 of 1957,** were repealed by the **Basic Conditions of Employment Act 75 of 1997** referred to above, which in turn was amended in 2002. Neither the 1983 Act nor said Wage Determination could readily be located by the Court and as such any potentially persuasive reasoning by the arbitrator, cannot be assessed fully.

Regulation Order or Collective Agreement, a right that an employee be absolved from tendering or performing services on public holidays but shall be entitled to full remuneration in respect of such days nevertheless.

16.1 It would follow therefrom that, where an Order or Agreement permits for paid public holidays, all employees would be entitled to refuse to tender or render services on those days unless otherwise agreed.

16.2 *In casu*, the Agreement provides:

16.2.1 That:

"***"All gazetted public holidays shall be observed by the employer;"***[31]

16.2.2 As regards ***"normal working hours"*** that:

"... ***Credit will be given for public holidays, off periods and off days permitted by the employer;"*** [32]

[31] [Clause 4.1]

[32] [Clause 3.1]

16.2.3 As regards overtime:

16.2.3.1 That the length of overtime would be a set length-

"... *except on weekends and public holidays in which case the overtime may be set upon agreement;*"[33] and

16.2.3.2 That:

"The working of overtime shall not be compulsory except in emergency situations."[34]

16.2.3.3 As regards tendering or rendering of services on public holidays, and in respect of the Christmas holidays, i.e., noon on Christmas Eve to 1st January of the following year,[35] that:

"*Management shall reserve the right to retain staff for provision of services to clients during the Christmas holidays and those individuals shall be entitled to take off the same number of working days thereafter...*"[36]

D CONCLUSIONS AND ORDER

[17] Interpretation of a contract, which is what the Agreement constitutes, predominantly is a question of law.

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33 [Clause 3.2.1]
34 [Clause 3.2.7]
35 [Clause 4.1.1]
36 [Clause 4.1.2]

[18] The following can be extrapolated from the above:

18.1 The Agreement provides for paid Gazetted public holidays as is meant by the **Employment Act** i.e., a fully paid holiday;

18.2 In terms of the Agreement, generally, an employee is not expected or obliged to render or tender services on a public holiday, from which it follows that public holiday payment is not dependent on the tendering or rendering of services; had that been the case, it would be a working day and not a holiday;

18.3 *In casu*, however, there are three evident agreed exceptions being:

18.3.1 Agreed overtime;

18.3.2 Compulsory overtime in emergency situations; and

18.3.3 As regards Christmas holidays, which would include the public holidays of Christmas Day, Boxing Day and New Year's Day; the services of the employees are retained and the employees are

obliged to tender and/or render services to the Employer also on those days.

18.4 Neither striking nor non-striking employees are obliged to tender or render services on public holidays unless an agreed exception finds application.

18.5 The obligation on the Employer to observe Gazetted public holidays is qualified in the Agreement only by the overtime and Christmas Holiday clauses and not, for instance, by a provision that an entitlement to a paid public holiday would not apply in the event of a protected strike or lockout;

18.6 Said **section 87(3)** stipulates that: "…***an employer is not obliged to remunerate an employee for services that the employee does not render during a protected strike or a protected lockout.***"

18.6.1 No employee renders services on a public holiday unless there was a contrary agreement with the employer;

18.6.2 In general, payment in respect of public holidays is not dependent on services tendered or rendered; it is a remunerative "*free pass.*"

[19] Consequently, the conclusion by the Court *a quo* that: "***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***" in our respectful view is materially flawed in that non-striking employees, in general, are also not tendering or rendering services on public holidays yet they are entitled to payment. [37]

[20] To uphold this conclusion by the Court *a quo,* in our view would be to endorse discrimination against striking employees, constituting a prohibited employer practice in terms of section **100(1)(a)** of the **Industrial Relations Act.**

[21] In the result, the appeal is bound to succeed.

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[37] It appears to be common cause on the papers that none of the three exceptions listed above, found application to the facts *in casu*

[22] Reverting to the Notice of Application *a quo*, the Court is mindful of the fact that the issue of public holidays falling within a strike period, at the time, was an open issue and susceptible to different views, which may impact further on the question of costs and interest.

[23] Accordingly, it is the Order of this Court that:

1 The appeal is upheld.

2 The Order of the Court *a quo* is set aside and substituted with the following:

"1 The Respondent is ordered and directed to refund the Applicant and or it members their deducted salaries for the two (2) public holidays between 27 August 2019 to 7 October 2019.

2 The Respondent is ordered and directed to pay interest at the rate of 9% per annum on the above amounts from the date of this Industrial Court of Appeal Order, until date of final payment.

3 No order as to costs."

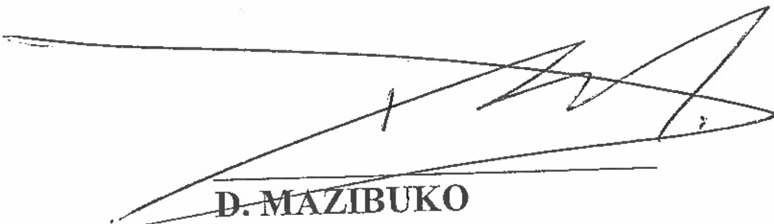
3 No order as to costs on appeal.

J.M. VAN DER WALT
JUSTICE OF APPEAL

I agree

S. NSIBANDE
JUDGE PRESIDENT

I agree



D. MAZIBUKO
JUSTICE OF APPEAL

For the Appellant: Mr. K Simelane of K N Simelane Attorneys in association with Henwood & Co
For the Respondent: Mr. Z. Jele of Robinson Bertram Attorneys

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