IN THE HIGH COURT OF ESWATINI

JUDGMENT

Held at Mbabane Case No. 765/2021

In the matter between:

PRINCIPAL SECRETARY MINISTRY
OF HOUSING AND URBAN DEVELOPMENT 1ST APPLICANT

PRINCIPAL SECRETARY MINISTRY OF
PUBLIC SERVICE 2ND APPLICANT

AND

NATIONAL PUBLIC SERVICE AND
ALLIED WORKERS AND UNION (NAPSAWU) 1ST RESPONDENT

KHONTAPHI MANZINI 2ND RESPONDENT

Neutral citation: *Principal Secretary Ministry of Housing and Urban Development vs National Public Service and Allied Workers and Union & Another [765/2021] [2021] SZHC 191 (18 October, 2021)*

Coram: FAKUDZE, J

Heard: 22/04/2021; 29/04/2021; 01/06/2021 and 21/07/2021

Delivered: 18th October, 2021

JUDGMENT

BACKGROUND

[1] The Applicants lodged the present Application on the 22nd April, 2021 on an urgent basis seeking the following:

1. Dispensing with the normal times and limits of the Rules of the above Honourable Court and enrolling the matter as urgent;

2. Condoning the Applicants' non-compliance with the Rules on Forms, dies and manner of Service;

3. That an Interim Rule with immediate effect be granted on the following terms returnable on a date to be set by this Honourable Court;

3.1 That the execution of the Arbitration Award dated 20th April, 2021 under CMAC Ref: SWMZ 260/2020 be stayed pending finalisation of this matter.

4. That the execution of the Arbitration (2nd Respondent) Under CMAC Ref. SWMZ 260/2020 be reviewed and set side.

5. Costs of suit.

[2] On the 22nd April, 2021, the parties entered into an *interim* arrangement pending finalisation of the matter as follows:

"1. The award under (MAC REF: SWMZ 260/2020 issued on the 20th April, 2020 is hereby stayed pending finalisation of this matter.

2. In the interim the Firemen shall work in the following shift system:

(a) From 08.00 AM to 4.00 PM.

(b) From 4.00 PM to 8.00 AM

3. There shall be no overtime claim pending the finalisation of the matter and will not be claimable for this period before the determination of the matter;

4. There shall be no obligation on the part of the employer to provide transport for the night shift during this period;

5. There shall be no work no pay effected in the next salary due in May 2021 depicting none attendance up to the 22nd April, 2021.

[3] The 1st Respondent raised the issue of *locus standi* of the Applicants by way of a point of law. This point was abandoned by the 1st Respondent during argument.

THE PARTIES' CONTENTION

The Applicants

[4] The Applicants contend that the 2nd Respondent failed to apply her mind to the issue that there were consultative meetings that related to the issue of shift hours. The Arbitrator's award which is being challenged, has the effect of amending the 2004 Agreement which stipulates the total number of hours the 1st Respondent's workers are to work. The Applicants state that the effect of Circular 4 of 2021 was to endorse the

position and the position was further endorsed by the Court of Appeal. The decision by the 2nd Respondent was therefore grossly unreasonable and should therefore be set aside. The Court of Appeal had also concluded that the determination of shift hours was the prerogative of the employer as enshrined in the 1994 Collective Agreement.

[5] The Applicants further contend that the Agreement of 2004 provides for the payment of an extended duty allowance of twenty (20%) of basic salary to a certain category of firemen especially those engaged in shift work. The extended duty allowance adequately compensates for payment of overtime allowance. The Applicants contend that the shift system does not contemplate any situation where an employee would have to work over the stipulated time resulting in the payment of overtime.

[6] The second contentious issue in the Arbitration pertains to the payment of 1st Respondents' workers for being on duty during a public holiday or holidays. The Applicants contend that a public holiday need not to be compensated in monetary form. It could be in any kind. This is based on the interpretation accorded to the term "remuneration" in the Industrial Relations Act, 2000 and the interpretation of "wages" in the Employment Act. The Applicants further contend that emphasis has been placed on Section 128 of the Employment Act that an agreement not to pay a worker for a public holiday is null and void. The Applicants argue that an employee need not be paid in monetary form. The Employer has opted to give 1st Respondent's workers some off days *in lieu* of the paid public holiday as some form of remuneration. After all, the 1st Respondent's workers are in the essential services category in terms of the Industrial Relations Act.

[7] The third contentious issue relates to payment of overtime. Clause 2.4 of Circular no. 4/2020 effectively does away with overtime payment in contravention of the 1994 Agreement. This happened after there was consultation between the employer and the 1st Respondent. The complaint was that the removal of overtime payment was in contravention of the Establishment Circular No. 1/1994 which provides that whenever the need arises for the 1st Respondent's workers to work overtime, they would be entitled to claim it. The Applicants' argument is that the shift system does not contemplate payment of overtime given that the employees will never exceed the stipulated shift hours.

[8] The fourth issue pertains to deprivation of extended duty allowance for employees who are on maternity leave, study leave or any form of leave exceeding a period of thirty consecutive days.

[9] The fifth issue pertains to transportation of 1st Respondent's members beyond the 20 km radius.

The Respondent

[10] The 1st Respondent's case is that the Circular issued by the Applicants conferred rights accruing from Collective Agreements which were a result of negotiations. The Circular is, according to the 1st Respondent, in violation of the law. On the issue of transportation, it transpired that it cannot be divorced from the issue of housing. The 1st Respondent's employees alleged during the negotiations, that there is inadequate housing. This issue is linked to the issue of transportation. The proposal was that employees engaged in shift work should be provided with transport because there are also females

who work in the shift system. It should not be limited to the 20 kilometre radius.

[11] On the issue of the working hours the 1st Respondent's employees are to work for 48 hours per week. General Order A 1000 provides that civil servants are to work for 40 hours a week. The 48 hour arrangement was negotiated and agreed upon in terms of the 1994 Collective Agreement. It is therefore a settled issue. The new circular dealt away with the issue of payment of overtime in cases where the 40 hours have been exceeded.

[12] The 1st Respondent also avers that the new Circular contravenes provisions of General Order A250 and the Employment Act, 1980 in that it creates a new condition of employment which is to the effect that female employees who are on maternity leave shall not be paid their extended duty allowance. This is work discrimination.

[13] On the issue of paid public holidays, the 1st Respondent states that the Circular changes the law in the sense that a person who works on a public holiday must be remunerated in cash. The circular has introduced payment in the form of an off duty day.

Grounds for review

[14] The Applicants allege that the 2nd Respondent has caused a reviewable irregularity with respect to the following:

(a) She failed to follow the Supreme Court Judgment **of Swaziland National Association of Civil Servants v Swaziland Government (20/11) [2011] SZSC 53 (30 November, 2011)** which clearly stated that the issue of the shift system

which impacts on overtime falls within the managerial prerogative. The employer can consult on this area;

(b) She failed to appreciate that the employees are paid a bus allowance for staying beyond the 20 kilometre radius in terms of the General Orders;

(c) She also ignored that the firefighters are getting an extended duty allowance to ameliorate any hardships that they may endure in travelling to their home at night.

(d) She failed to appreciate that the law does not allow employees in the Essential Service Category to go on holiday and that you may be compensated by an off duty day instead of money. The 1st Respondent's employees are in the Essential Service Category. The Collective Agreement does not provide for this as well.

THE APPLICABLE LAW

[15] In the matter between **Swaziland National Association of Civil Servants v Swaziland Government (20/11) [2011] SZSC 53 (30 November 2011),** the Court of Appeal observed as follows in paragraph 42:

> *"[42] The introduction of the four shift system is a work practice that falls within Managerial Prerogative; and the First Respondent has conceded to this fact at paragraph 9 of its Supplementary Affidavit and Replying Affidavit where they stated:*
>
> *9.1 whilst accepting that the issue of the shift system might fall within managerial prerogative, and changes thereto and that affects our*

members, that does not exonerate the Respondent of the duty to consult us."

[16] In paragraph 41, the court had observed as follows:

"[41] The four shift system does not deal or relate to the normal rate of pay of members of the First Respondent; the wages of the workers are not affected by the new shift system and the rate of overtime. Furthermore, the terms and conditions of employment of the employees are not affected by the new four shift system; their normal hours of work as well as their wages remain unchanged."

[17] In the widely quoted passage on review in **Johannesburg Consolidated Investments v Johannesburg Town Council 1903 TS 111 at 115** Innes C.J. remarked as follows:

"Whenever a public body has a duty imposed upon it by statute and disregards important provisions of the statute or is guilty of gross irregularity or clear illegality in the performance of the duty, the court may be asked to review the proceedings complained of and set aside or correct them."

[18] In **Swaziland Government v Khanyisile Msibi N.O. and 2 Others**, His Lordship Fakudze stated as follows:

"Even though a Superior Court has power to review decisions of lower courts and statutory bodies, it must jealously guard against finding itself re-analysing evidence with a view to reconsider the decision. This is based on the principle that the issue before a court on review is not the correctness or otherwise of the decision under review. The formulation of the test to be used by a litigant to succeed

on review was clearly set out by the Learned Judge President in the matter between ***Councillor Mandla Dlamini and Another v Musa Nxumalo, Appeal Case No. 10/2002*** *His Lordship stated that:*

"It is now settled that the courts in Swaziland to hold that it is no longer necessary for a litigant to prove that a decision-maker acted grossly unreasonable in order for such litigant to succeed on review. In this day and age, the test of gross unreasonableness is too narrow and too stringent or perhaps unreasonably too high a thresh hold. The decision must be whether the decision maker acted procedurally fairly or unfairly in the circumstances." See also ***Atlas Motors (Pty) v Machava and Another Case No. 77/2003.***

COURT'S ANALYSIS AND CONCLUSION

[19] The challenge with Circular No. 4 of 2020 as far as shift system is concerned is that it has done away with overtime, which according to the Court of Appeal judgment in **Swaziland National Association of Civil Service v Swaziland Government** (Supra), include it. The Judges made it clear in paragraph 41 that:

"[41] The four shift system does not deal or relate to the normal rate of pay of members of the First Respondent; the rate of pay of overtime remains unchanged. It is still regulated in terms of the 2004 award by the Arbitrator. Furthermore, the terms and conditions of employment of the employees are not affected by the new four shift system; their normal hours of work as well as their wages remain unchanged."

[20] The Appeal case referred to above only addressed the issue of the shift system when the Learned Judge observed that the determination of the

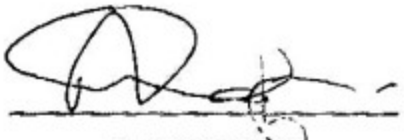
working hours is a managerial prerogative. It does not interfere with the terms and conditions of the employees. It is this court's view that the 2nd Respondent misdirected itself in introducing the four shift system as stipulated in the Collective Agreement which the Employer changed to the three in exercise of its managerial prerogative. It is also this court's view that the managerial prerogative introduced by the Applicants should not have included the issue of the overtime. During oral argument, the Applicants' Attorney pointed out that there will be no need for payment of overtime when the three shift system is implemented. However, the court kept on asking the Attorney why the circular should not address the issue of the overtime should the need arise for employees to work overtime. If the Applicant is confident that there will no overtime, well and good. But in the event, it happens, total prohibition of payment of overtime is unfair.

[21] The point the court is making is that the issue of the shift system is a matter for managerial prerogative but the issue of overtime payment is part of the terms and conditions of employment of the 1st Respondent. The Circular must therefore be amended so as to deal strictly with the issue of the shift system and not touch on the issue of the overtime.

[22] On the issue of public holidays, transportation and payment of extended duty allowance to officers who are on maternity leave and study leave, it is this court's opinion that these relate to terms and conditions of employment. These matters should therefore be subject to negotiations as they form part of the Collective Agreement between the Applicants and the 1st Respondent. The greatest cry of the Employees is that Circular no. 4 of 2020 was issued without negotiations between the parties. The only item in Circular No. 4

that is excluded from negotiations and is subject of consultation is that of the shift system. This court has already pointed out that this is a matter of managerial prerogative. It does not extend to payment of overtime and the other items covered by the circular. The Applicant misconstrued the notion of managerial prerogative by extending it to matters that are dealt with by the Collective Agreement. It is this court's considered view that it finds no fault with the Arbitrator's finding except what has been pointed out above pertaining the shift system. It is also this court's view that even though this court has power to review decisions of lower courts and statutory bodies, it is seriously guarding finding itself re-analysing evidence with a view to reconsider the Arbitrator's decision. The Applicant is literally asking the court to re-consider the issues that were adequately dealt with by the Arbitrator.

[23] The interim order that was issued on the 22nd April, 2021 is hereby discharged except for the issue of the shift system which remains a matter for managerial prerogative. Since the Applicant is partially successful, each party shall bear its own costs.



FAKUDZE J.

JUDGE OF THE HIGH COURT