IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 179/99

In the matter between:

SWAZILAND MEDIA PUBLISHERS & WORKERS UNION APPLICANT

And

APOLLO SERVICES (PTY) LIMITED RESPONDENT

CORAM:

NDERI NDUMA : PRESIDENT

JOSIAH YENDE : MEMBER

NICHOLAS MANANA : MEMBER

FOR THE APPLICANT : MR. N. J. HLOPHE

FOR THE RESPONDENT : MR. PETER DUNSEITH

RULING

(24. 08. 99)

The Respondent has raised objections in limine to an application brought on a certificate of urgency by the Applicant.

The first objection is that the Applicant has not shown good cause why the Honourable Court should dispense with ordinary procedures and rules of court and hear the matter as one of urgency.

The basis for the urgency is contained in paragraph 20 of the Founding Affidavit as follows : "20 This matter is urgent by virtue of the fact that the Respondents affected members are currently out of work pursuant to an unlawful act of the Respondent and have been ordered to collect their packages".

The alleged unlawful act by the Respondent was to declare five employees redundant by a memorandum dated the 23rd July, 1999. The reason given therein for the intended redundancies is "down sizing due to a diminishing client base".



The effective date of the termination was 16.00hrs the same date i.e 23rd July, 1999. A sample of the notice addressed to one Mr. M. Hlatshwayo is attached to the Application and marked "SM2".

It is the Applicant's contention that the purported retrenchments are contrary to Sections 33 (4) and 40 of the Employment Act in that no notice was given to the employees, there is no mention of the number of employees involved, nor does it disclose the occupation and remuneration of the affected employees.

The Applicant further states that the reasons for the redundancies are not clearly stated. The Labour Commissioner was not informed of the decision and thus the termination of the Applicants amounts to unfair dismissal and should be set aside by the court.

Mr. Dunseith for the Respondent has submitted that on the authority of Swaziland Agricultural and Plantations Workers Union (SAPWU) v United Plantations - Industrial Court Case No. 79/98 , this

Application cannot be heard on the basis of urgency. That the five employees are seeking a final reinstatement on an urgent basis without following the procedures laid down under Part V111 of the Industrial Relations Act.

That the only difference between this case and the SAPWU case is that in the SAPWU case, the parties sought for interim relief pending the reporting of the dispute to the Labour Commissioner whereas in this case, a final order is sought without any intention to report the matter to the Labour department.

Though the reasons for the urgency as contained in paragraph 20 of the Founding Affidavit is that the employees have been unlawfully retrenched it can correctly be deduced that the Applicant relies on the financial difficulties they would suffer as a direct result of the loss of their jobs as the real reason for the urgency. It was held in the SAPWU case that financial difficulties are inherent in any dismissal and therefore cannot be relied upon as a basis for urgency.

In the SAPWU case, Justice Parker relied on the dictum of Justice Banda M. in Phineas Vilakati v J. D. Group (Pty) Ltd, Industrial Case No. 4/97 at p2 wherein he stated as follows :
"We agree with the Respondent that the reasons given to justify treating this matter as urgent do not differ from the normal reasons set out by persons who have brought application of unfair dismissal for determination by the court. If we were to order that this matter be treated as urgent on the grounds now advanced then every case now pending before court would qualify to be treated as urgent".



In the case of Swaziland Manufacturing and Allied Workers Union v Swazi Paper Mills, Industrial Court of Swaziland Case No. 8/99. We reviewed with approval the judgement of Friedman and Fagan J in L & B Marcow Carteres (Pty) Ltd v Greatermans SA Ltd & Another 1981 (4) SA 108 (C. P) wherein the Judges outlined three considerations which the court should take into account in exercising its judicial discretion to abridge the times prescribed and to accelerate the hearing as follows:

"The prejudice that Applicants might suffer by having to wait for a hearing in the ordinary course, the prejudice that other litigants might suffer if the application was given preference and the prejudice the Respondents might suffer by the abridgement of the prescribed times and an early hearing".

In the light of the above considerations to be made by the court a litigant should aver facts that show explicitly on the face of the Application why the matter is urgent. The Applicant cannot rely on facts and circumstances beyond the borders of its Founding Affidavit to show urgency. As we stated in the SMAWU case (supra);

"This court is of the considered view that it is entitled to look at the Founding Affidavit as a whole and if the only reasonable inference from the facts set out in the Affidavit is that the matter is one of urgency then an applicant will have complied with the requirements of urgency, even though he does not make a specific averment that it is urgent. See the case of Sikwe v SA Mutual Fire and General Insurance Co. Ltd 1977 (3) SA 438 G - H ".

In the SMAWU case we found that the Application was urgent on the basis that the Applicant had established on the papers that a notice to declare workers redundant in violation of Section 40 as read with Section 2 of the Employment Act was due to be implemented by the Respondent in a matter of days. At Page 5 of our ruling we had this to say :

"If a possibly invalid notice of redundancy is to be implemented in a matter of days then this application is justifiably urgent. This is not the kind of issue that should await the procedure provided for in Part V111 of the Act and is substantially different from the normal reasons set out by persons who have brought applications of unfair dismissal".

We restate this as the proper approach to take in matters of this nature. It is common cause that the five employees of the Respondent named in schedule "A" to the notice of motion were retrenched on 23rd day of July, 1999. This application was filed on the 2nd August 1999 and was argued on the 9th August, 1999. The effect of the prayers sought in the notice of motion would be to reinstate the

Applicants to the posts they held prior to the retrenchment on the 23rd July, 1999.



Upon consideration of the decision of Revelas J. in Fordham v OK Bazaars (1929) Ltd 1978) 19 ILJ 1150 (L C) we state that it is not open to the Industrial Court to issue a status quo order that has the effect of reinstating an employee who has been terminated from employment. We reckon this position has changed in South Africa where under Section 43 of the Labour Relations Amendment Act No. 9 of 1991, the court has the jurisdiction to issue status quo orders that have the effect of reinstating employees whose services have been terminated pending the finalisation of the case. This is not so in Swaziland.

This position remains the same regardless of what reasons under Section 36 of the Employment Act, the employer purports to rely on in terminating the services of the employee. If however, the notice to terminate has not taken effect, then the court in terms of Section 5 (3) may grant injunctive relief.

The Applicant's difficulties in this application are compounded by its failure to name the five employees as parties to this Application. It would be an exercise in futility to issue an order of reinstatement in favour of the Applicant which is a union as opposed to the respective employees.

It is not opportune for us to consider the objection raised as regards the requirements for the grant of an interim order in view of the insuperable difficulties faced by the Applicant concerning the issue of urgency.

The Application is accordingly dismissed with no order as to costs.

NDERI NDUMA

PRESIDENT -INDUSTRIAL COURT