IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE	CASE NO. 272/2002
In the matter between:	
PHYLYP NHLENGETHWA	1ST APPLICANT
SIBONGILE MYENI	2ND APPLICANT
SIPHO DLAMINI	3TH APPLICANT
ZODWA DLAMINI	4TH APPLICANT
AMOS NDLOVU	5TH APPLICANT
COLLIE DLAMINI	6TH APPLICANT
VINCENT NDLOVU	7TH APPLICANT
and	
SWAZILAND ELECTRICITY BOARD	RESPONDENT
CORAM:	
NDERINDUMA:	PRESIDENT
JOSIAH YENDE:	MEMBER
NICHOLAS MANANA:	MEMBER
FOR APPLICANT:	P. FLYNN
FOR RESPONDENT:	Z. JELE

RULING

01/11/02

The seven (7) applicants, all senior managers of the Respondent which is a category 'A' Public Enterprise have moved an urgent application seeking for an order in the following terms:

1. Waiving the usual requirements of this Honourable Court regarding notice and service of this application in view of the urgency of the matter.

2. pending final determination of this application, the Respondent be interdicted and restrained from implementing the restructuring

exercise contained in respondent's inter-office Memoranda dated the 12th August 2002 and the 23rd August 2002.

3. That a rule nisi, returnable on a date to be arranged by this Honourable court, be issued calling upon the Respondent to show cause why:

3.1. The restructuring exercise contained in Respondent's inter-office Memoranda dated the 12th August 2002 and 23rd August, 2002 should not be declared unlawful.

3.2. The Respondent's should not be ordered to restore the Applicants to the positions they held prior to the 12th August 2002.

3.3. The Respondent should not be ordered to pay the costs of this application.

The application is grounded on the affidavit of Phylyp Nhlengethwa the 1st Applicant and supporting affidavits of the other Applicants.

The Respondent's Answering Affidavit is deposed to by the Managing Director of the Respondent Mr. Themba Tsela.

The Respondent raises objections in limine therein as follows:

1. paragraphs 4.1 - 4.4; the application is not urgent because: "the Applicants have failed to explicitly set out circumstances that render the matter urgent as per the requirements of High Court Rule 6 (25) as read with Rule 10 of the Industrial Court Rules.

2. paragraph 5; the applicants have failed to comply with Section 26 of the employment Act No. 5 of 1980.

3. Paragraph 6; the Applicants' Notice of Motion is fatally defective as same does not comply with the High Court Rule 6 (9) as read with Rule 10 of the Industrial Court Rules (ICR) per the decision in the High Court judgement of Ben Zwane v Prime Minister.

The objection raised in paragraph 7, on the requirements of an interdict was deferred to arguments on the merits if the points in limine were not upheld.

The locus classicus on Rule 6 (25) of the High Court Rules, in Swaziland is the judgement of Justice Ben Dunn (as he then was) in the mater of Humphrey H. Henwood v Maloma Colliery Ltd and Attorney General,1

In that case,the 1st Respondent Maloma Colliery Ltd a coal mining company had in 1989 entered into the Applicant's farm numbers 422 and 481 both situate at Maloma. Following a prospecting agreement between the company and the Swazi nation on the 24th June 1992, the company was granted a mining lease by the Ngwenyama. The installation of the mining equipment commenced in October 1992 and the actual mining commenced about July, 1993.

Prior to May 1993 the applicant received legal advice that the mining was commenced in disregard and violation of his rights under the Mining Act No. 5 of 1958 and therefore the First Respondents presence and mining operations on his property was unlawful. He launched an application on a certificate of urgency on the 16th September 1994 with notice that it would be heard at 9.30a.m. Wednesday 21st September. This was after protracted negotiations to resolve the matter amicably had failed.

The Respondent filed an Answering Affidavit on the 21st and an objection stating that the application was not urgent. The 2nd Applicant also sought to argue the point, though he had not filed any papers citing short notice.

The issue the judge had to determine interalia as set out at pg 11 of the judgement is as follows:

"whether or not given the protracted negotiations between the parties, the Applicant is entitled to rush to

court without affording the respondents the opportunity to reply and state their case to the serious allegations of law and fact set out in the application."

It was held that the application was not urgent since the matters complained of by the Applicant were long standing. The applicant had not established that he would be prejudiced by adhering to the time limits set out under.

1 Case No. 1623/94, unrept

Rules 6 (10) and 6 (12). That it may well be that the Applicant had a strong case, but that did not mean that the application was urgent.

A similar argument has been raised by the Respondent against bringing this application on an urgent basis.

It is common cause that the restructuring exercise the Applicants seek to have set aside was initiated on the 12th August 2002 by way of a memorandum by the managing director who had been newly appointed on the 1st August 2002. The memorandum is annexure 'R1' to the application.

The 1st Applicant who held the post of Senior Manager Technical Services was appointed projects manager in charge of phase 11 Rural Electrification.

The 2nd Applicant Sibongile Myeni was appointed to the post of Business Analyst reporting to the GMBD. Prior to the restructuring exercise her substantive post was that of a Power Economist and was Acting Senior Manager Corporate Planning for two years.

The 3rd Applicant Sipho Dlamini prior to the restructuring occupied the post of Purchasing Manager but was at the time Acting Materials Manager, he was reverted to his substantive post which was junior to the position he acted.

The 4th Applicant Zodwa Mkhonta was the Regional Manager Shiselweni but was appointed Industrial Relations Manager at the head office. This she says has lowered her status, certain privileges and diminished her training and promotion opportunities. It is also an inconvenience since she was based in Nhlangano but has now to commute to Mbabane daily since she has no accommodation yet.

The 5th Applicant Amos Ndlovu was prior to the restructuring exercise, the Regional Manager Lubombo based at Tshaneni. He was transferred to the Safety, Health, Environment Risk, and Quality Division. He was not assigned a specific position nor given a job description. He asserts that the said restracturing is prejudicial to him without stating the reasons.

The 6th Applicant Collie Dlamini was prior to the restructuring a Senior Manager Internal Audit. He avers that the functions of his post have been changed with the effect that the post has been down graded and deprived of

independence as he is to report to the Managing Director instead of the Audit Committee of the Board of Directors. He alleges further that his office is now part of the Managing Director's office who controls the activities of Internal Audit.

The 7th Applicant Vincent Ndlovu was previously Industrial Relations Manager based at the Headquarters Mbabane responsible for all Industrial Relations issues for the Respondent. Upon restracturing, he was given the position of Industrial Relations Manager Staff (Customer Services Division only) and was moved to Manzini.

He alleges diminution of status and privileges of his job.

It is not disputed that twelve (12) other senior employees, who were affected by the restracturing exercise are not party to these proceedings and have assumed their new posts accordingly.

That the 6th and 7th Applicants are presently on suspension on foil pay pending disciplinary proceedings against them.

It is also not in dispute that the Applicants have protested to the Managing Director and the Board of Directors regarding the variations of their job positions which protest culminated in a letter by their attorney to the chairman of the board.

The chairman of the board advised that the Applicants address their grievances through internal structures without involving third parties.

It is also common cause that five (5) members of the board called an extraordinary meeting of the board to address these issues without much success, since their efforts did not find support from neither the managing director nor the chairman of the board, both of whom failed to attend the meeting.

The Managing Director in their Answering Affidavit avers that the restructuring which is the prerogative of the managing director was a result of numerous reports and studies commissioned by the Respondent which have recommended the changes he had now effected for sufficient running of the Swaziland Electricity Board. He alleges that he did consult with the Applicants who comprise in any event a small fraction of a large number of

employees that have been affected in one way or the other by the restracturing exercise. He adds that the exercise as a whole is in the interest of the proper functioning of the Respondent and gives various examples of how the changes will enhance proper management of the affected departments.

Furthermore at paragraph 7 of his affidavit, he adds that the memorandum effecting changes was circulated after he had personally consulted with each and every individual who was going to be affected by the re-deployment. New job descriptions have also been written for those officers including the Applicants who have been re-deployed.

The detailed account of the restracturing exercise by the managing director in his Answering Affidavit has not been met with any Replying Affidavits. His averments remain therefore largely uncontroverted other than by counsel for the Applicant Advocate Patrick Flynn in his lengthy and well formulated submissions in his attempt to demonstrate why the application is urgent. The Applicants had a choice to seek postponement of the matter and file in a reply before arguments but they were amenable to argue the objection in limine before filing in the Replying Affidavit. This approach has got its risks, especially on a party who bears the onus of demonstrating why the application ought to be admitted as one of urgency and the court to therefore waive the usual requirements regarding notice and service of the application.

Before the Industrial Court, unlike at the High Court an Applicant bears a further onus of showing why, he did not follow the laid down dispute procedures found in Part VIII of the Industrial Relations Act No. 1 of 2000. In particular, Rule 3 (2) of the Rules of the Industrial Court reads as follows:

"3 (2) the court may not take cognizance of any dispute which has not been reported or dealt with in accordance with Part VII of the Act. "

This rule is now to be read to refer to Part VIII of the Industrial Relations Act No. 1 of 2000 and in particular the reporting procedure provided under Section 76(1) of the Act.

Since the landmark decision by Hannah CJ as he then was in Swaziland Fruit Canners (Pty) Ltd v Phillip Vilakati & Another2 the Industrial Court

has religiously enforced Rule 3 (2) as read with the Industrial Relations Act from its 1980 Edition to the 1996 and the present one.
The ratio decidedi of the decision is as follows:

"Not every party to a industrial dispute is entitled to have the dispute determined by the Industrial Court. Looking at the matter generally, the policy of the Industrial Relations Act is that before a dispute can be ventilated before the Industrial Court, it must be reported to the Labour Commissioner who is obliged to conciliate with a view to achieving a settlement between the parties. Where the conciliation is successful machinery exists for the agreement arrived at to be made an order or award of court but where the dispute remains unresolved the Labour Commissioner is obliged to issue a certificate to that effect and then, and only then, may application be made to the Industrial Court for relief."

One of the very few exceptions to this rale is where a party is able to prove urgency as the Applicants in casu have embarked to do.

It was held in the case of Humphrey Henwood (supra) that a litigant cannot engage in various correspondence and/or attempts to settle a matter in other places and when those attempts seem to be failing, then rash to court and contend that the matter is urgent. It was further held in that matter that this is not a basis of urgency and in that hearing the application was dismissed. This view was reaffirmed in the case of Paul Shilubane v Collin Ntiwane and Another.3

It is common cause that the Applicants were notified of the intended restracturing on the 12th August, 2002. The Applicants did not opt to come to court immediately to stop the process but instead engaged other forums such as the Managing Director, Board of Directors and the Public Enterprise (Control and Monitoring Unit) to resolve the matter. They then approached the court by way of an urgent application on the 9th October, 2002 when their efforts did not seem to bear fruit expecting the court to put aside its business and hear this matter on the basis of urgency.

3 High Court Case No. 2296/1997. unrept

Ironically, the Applicants did not find it useful to approach the Commissioner of Labour by way of reporting a dispute in terms of Section 76 (1) of the Industrial Relations Act nor did it occur to them that their grievance could be adjudicated upon expeditiously in terms of Section 26 of the Employment Act No. 5 of 1980.

In his attempt to explain to the court why the Applicants did not utilize the procedure provided under Section 26 (1) and (2) of the Employment Act, Mr. Flynn submitted that the Respondent upon re-deployment of the Applicants did not provide them with a notice specifying the changes which were made to their terms and conditions of service, which in the employee's view were less favourable than those previously enjoyed by them and therefore they could not utilize the said procedure.

In this, Mr. Flynn missed the point. Infact, the Applicants have appended their previous terms and conditions of service to the application and have fully outlined the job descriptions of the new positions in the Affidavits and various attachments thereof. This being so, all that was required of them was to request the Respondent in writing within fourteen (14) days of such notification with a copy to the Commissioner of Labour to submit their previous terms and conditions of service together with the notification of the changes (which changes have explicitly been outlined in the application) and the Respondent would have been bound to comply with the request within three days of receiving the request.

It is the court's view that the employer was in a position to comply with the request in terms of Section 26 (1) and (2) of the Employment Act and the Commissioner of Labour would have dealt with the matter in terms of Section 26 (3) thereof.

It is to be noted that failure to follow the procedure does not preclude, a meritorious Applicant, to be entertained by the Industrial Court on an urgent basis provided the basis of such urgency is explicit on the face of the application.

The Applicant's have set out the basis of the urgency in paragraphs 29.1 to 29. 4 as follows:

"29.1. to prevent irreparable prejudice being occasioned on the Applicants and their positions.

29.2. the said restructuring exercise has caused a lot of discontent and uncertainty amongst the Respondent's employees and the present Applicants.

29.3. The said discontent has the potential of disrupting Respondent's activity and is causing industrial unrest at Respondent's undertaking.

29.4. The restructuring is presently ongoing and will affect other positions."

In response to these averments, in paragraph 22 of the Answering Affidavit to which there has been no reply, the Managing Director states that the Applicants have not outlined clearly the prejudice caused by the restracturing. That there is no unrest or potential industrial unrest at Swaziland Electricity Board. The rest of the affected officers are working and have accepted their new positions.

That the Applicants simply did not wish to embrace the changes and are aggrieved by the appointment of the Managing Director. And that indeed the urgency is but a figment of their own imagination. He further alleges that the applicants are acting in concert with certain members of the Board of Directors and have organized a faction that is opposed to anything that is done by the organization.

To these averments, the Applicants have not replied yet they bear the onus of satisfying the court that the reasons advanced for urgency are valid.

The Managing Director avers finally that the Applicants ought to have availed themselves of the dispute resolution procedure under Section 26 of the Employment Act or under the Industrial Relations Act No. 1 of 2000 and that the Application is not urgent and same be dismissed with costs.

Mr. Jele for the Respondent in his able submissions emphasized that if indeed, the averments of the Applicants, are true, then the recognized Staff Association, the recognized union and in the least, all the affected employees would have been party to these proceedings. That infact, the two

associations have shown no interest in the matter is indicative of the contrary scenario to that expressed by the Applicants.

The court meromotu, raised the concern that majority of the employees admittedly affected by the restracturing and the deployment had infact

assumed their positions and would inevitably be affected by the orders sought by the Applicants, The parties were in agreement that this complicated the matter and created a need for the dispute to be ventilated in an all embracing manner rather than by way of inadequate papers hurriedly drafted and placed before court. This hardly augurs well for the industrial environment at the work place, especially in an enterprise such as the Respondent which is the lifeblood of all the sectors of the economy including

the domestic needs of most of the inhabitants of the kingdom.

On this Hannah CJ in the Fruit Canners case had this to say:

"it is most desirable that industrial disputes be settled, if possible, by means of conciliation rather than determined in the more formal surrounds of a court and no doubt the existence of a statutory conciliation procedure saves the Industrial Court from hearing many times consuming cases which are capable of resolution with the assistance of a neutral and expert third party. The importance of the Labour Commissioner's role is such that the duties imposed upon him by Part VII of the Industrial Relations Act should in my view, be strictly observed."

We must add that the 2000 Act has since created a further structure in terms of Section 62 (1) of the Act, known as the Conciliation Mediation and Arbitration Commission (CMAC) which is an independent body with the task of resolving disputes of this nature by way of conciliation, mediation and arbitration.

The creation of this institution has increased the need for the Industrial Court, to enforce strict observance of the dispute resolution procedures under Part VIII of the Act because we now have a more suitable structure of expeditiously, conveniently and less expensively resolving industrial disputes which otherwise find their way unnecessarily to this court, and in the process aggravating the backlog the court has suffered for a long time.

Upon a careful consideration of the facts that are common cause and the averments, explicit on the papers filed of record, especially taking into account that there has been no reply to the Answering Affidavit of the Respondent, the court finds that the Applicants have failed to show why the court should jump the queque and deal with this matter on an urgent basis.

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The Applicants took two months to bring the matter before court inspite of their knowledge that the restracturing process had commenced on the 12th August, 2002 and was continuing inspite their protestation to the Managing Director and the board of directors.

On the issue raised by counsel for the Applicants as to the legality of the restracturing exercise which itself was argued to be a cause of urgency, the court makes the following observations:

Section 10 (9) of the Electricity Act No. 10 of 1963 provides for the appointment of the Chief Executive Officer and he is to hold office for such a period and subject to such conditions as the board may decide.

Under Section 10 (b), the Chief Executive Officer is charged with the management of the business of the board and its administration and organization and with the appointment and control of the staff of the board.

A cursory reading of this section indicates that deployment of staff in the manner the managing director has done is within his area of jurisdiction and authority, subject to the directions of the board.

It is common cause that the restracturing was approved by the board but afterwards, five members of the board wanted the issue to be further ventilated upon a realization that they may have been mislead to approve the restracturing. Up to the time this application was brought before court, this issue had not been revisited for reasons alluded to earlier.

It was contended by Mr. Flynn that indeed the Chief Executive Officer had exceeded his mandate by conducting the restracturing without the approval in writing of the Minister responsible acting in consultation with the Standing Committee of the Public Enterprise (Control and Monitoring Unit) created under Act No. 8 of 1989.

For this proposition, we were referred to Section 10 (1) of the said Act. Upon a close look of the section

and all its subsections, non covers the type of restracturing that has been conducted by the managing director. The closest, he came to it was in terms of Section 10 (1) (e) which reads thus:

"10 (1) No Category A Public Enterprise shall do any of the following without the approval in writing of the Minister responsible acting in consultation with the Standing Committee.

(e) make any major adjustment to the level or structure of staff salaries and wages or other terms and conditions of services of its staff."

It is common cause that no adjustment has been made to the level or structure of staff salaries and wages. Some of the terms and conditions of service of the affected employees, may have been affected adversely or otherwise. Whether the exercise was a major one, is at this point, given the information before us, a matter for speculation.

That not withstanding, it is clear that the seven Applicants are unhappy with their re-deployment and want that addressed. Their grievances in relation to the huge structure of the Respondent need to be put in a proper perspective in a proper forum, be it the Standing Committee aforesaid, the Minister and /or before the Conciliation Mediation and Arbitration Commission (CMAC) upon following the laid down procedures. Such issues of fact cannot be adequately resolved without the parties concerned leading evidence on the pertinent issues but definitely, not by way of papers filed in an urgent application.

The court was initially inclined to direct the parties to submit themselves to a mediator and/or proceed in terms of Section 26 of the Employment Act. However, we have found it proper to let the parties elect how best they wish to have the dispute resolved. The Application is accordingly dismissed in its entirety.

There will be no order as to costs.

The Members Agree.

NDERI NDUMA

JUDGE PRESIDENT - INDUSTRIAL COURT